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THE  
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT  
OF ONTARIO (APPELLATE AND HIGH  
COURT DIVISIONS).

CITED [1931] O.R.

REPORTED UNDER THE AUTHORITY OF THE  
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1931

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**JUDGES**  
**OF THE**  
**SUPREME COURT OF ONTARIO**

DURING THE PERIOD OF THESE REPORTS.

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APPELLATE DIVISION.

*First Divisional Court.*

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THE HON. JAMES MAGEE, J.A.

“ “ FRANK EGERTON HODGINS, J.A.

“ “ WILLIAM EDWARD MIDDLETON, J.A.

“ “ DAVID INGLIS GRANT, J.A.

*Second Divisional Court.*

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“ “ WILLIAM RENWICK RIDDELL, J.A.

“ “ CORNELIUS ARTHUR MASTEN, J.A.

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“ “ WILLIAM EDWARD RANEY, J.

“ “ NICOL JEFFREY, J.

“ “ CHARLES GARROW, J.

“ “ GEORGE HERBERT SEDGEWICK, J.



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# REPORTS OF CASES

DETERMINED IN THE

## SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

### [APPELLATE DIVISION.]

DE MOTT V. CLYSDALE.

1931.

Jan. 23.

*Negligence—Motor-vehicle upon Highway—Motorist Coming from behind Running into Horse Driven by Plaintiff—Failure to Give Signal—Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 38—Finding of Contributory Negligence Reversed on Appeal—Quantum of Damages—Increase on Appeal.*

The plaintiffs, husband and wife, were proceeding north upon a highway, in a vehicle drawn by a horse and driven by the husband, when the defendant in an automobile came along behind them, and, wishing to pass them, ran into the horse as it was being turned to the left to go into a lane. As a consequence, the plaintiffs were injured; they brought this action for damages, charging the defendant with negligence. The defendant counterclaimed for damages, charging the plaintiffs with negligence. The trial Judge found negligence of the defendant and contributory negligence of the plaintiffs, assessed the damages on both sides, and apportioned the blame. The plaintiffs appealed against the finding of negligence on their part and as to the quantum of damages:—

*Held*, that the plaintiff driving the horse had the right to expect that the defendant, or any one desiring to pass, would give a signal; and, as no signal was in fact given, there was no contributory negligence on the part of the plaintiffs in not seeing the defendant. Section 38 of the Highway Traffic Act is explicit in requiring a signal of the desire to pass and an opportunity to turn out to be given to the rider or driver of a horse.

The wife-plaintiff, at all events, could not be saddled with negligence. The sole actionable negligence was that of the defendant.

*Johnston v. Seagram* (1930), 38 O.W.N. 64, followed.

*Held*, also, that the Court had the right to increase the amount of damages awarded by the Judge who tried the action without a jury; and the plaintiffs' damages were increased accordingly.

*Van Camp v. Anderson and Carter* (1928), 63 O.L.R. 257, followed.

AN appeal by the plaintiffs from the judgment of the County Court of the County of Lambton (TAYLOR, Co. C.J.), in an action brought to recover damages for injuries suffered by the plaintiffs, husband and wife, in a collision between their horse and buggy

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and the defendant's motor-vehicle upon a highway. The County Court Judge gave judgment for the plaintiffs for \$150.35 and costs, and for the defendant upon his counterclaim for \$35 and costs, with a set-off, finding negligence on the part of both plaintiffs and defendant. The appeal was against the finding of negligence of the plaintiffs and as to the quantum of damages, the plaintiffs asking that the full amount claimed by them, \$500, should be awarded.

December 15, 1930. The appeal was heard by LATCHFORD, C.J., MAGEE, RIDDELL, and FISHER, J.J.A.

*G. Logan*, for the appellants, argued that the learned trial Judge erred in finding that they were negligent in failing to give warning of their intention to turn to their left in the pathway of an on-coming car. In any event, the wife-plaintiff could not be so to blame. The sole actionable negligence was that of the defendant in not signalling his desire to pass, as required by the Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 38. See also *Johnston v. Seagram* (1930), 38 O.W.N. 64.

*T. N. Phelan*, K.C., for the defendant, respondent, contended that he had not been warned in any way that the appellants were going to turn to the left into the lane. They were guilty of negligence causing the accident by not giving some sign to on-coming traffic that they were going to make the turn.

January 23, 1931. The judgment of the majority of the Court was read by RIDDELL, J.A.:—This is an appeal from the judgment of the learned County Court Judge of the County of Lambton, delivered in October, 1930.

The facts are that the plaintiffs, husband and wife, of somewhat advanced years, were jogging north on the highway in Corruna; the defendant in an automobile came along behind them, and, wishing to pass them, ran into the horse as it was being turned to the left to go into a lane. The learned Judge found both parties negligent—though how, on any theory, he could saddle the female plaintiff with negligence, I fail to apprehend. If there was any negligence in driving the horse, it clearly was not hers; so that, in any event, the female plaintiff is entitled to recover her full damages.

But the plaintiffs go further and contend that the sole actionable negligence was that of the defendant; and, unless we are prepared to reverse our decision in the case of *Johnston v. Seagram*,

38 O.W.N. 64, I am unable to see that the plaintiffs were, in any way, to be found guilty of negligence occasioning the accident. App. Div. 1931.

In that case, the judgment of three of us was thus expressed (p. 65) :— DE MOTT v. CLYSDALE.

“As to the plaintiff this Court has more than once said that the care to be exercised, while it must always be at least reasonable, depends upon what the party expects or should expect; no one is held to be a mind-reader, or to anticipate what has no likelihood of occurring, and every one (with due limitations) has the right to expect that others will observe well known law and well established practice. Riddell, J.A.

“It is the law, and has been for many years, that any one desiring to pass another is to turn out to the left so far as is necessary to avoid a collision: sec. 35(6) of the Highway Traffic Act. The plaintiff was not bound to expect that a driver endeavouring to pass the car he saw would keep to the right of it, instead of obeying the law and going to the left. Had the defendant been obeying the law, the plaintiff would have seen him, and the accident would, no doubt, have been avoided.”

To apply these words to the present case, this fact is to be kept in mind, that the statute is imperative in respect of the conduct of the driver of an automobile under the circumstances of the present case. The Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 38, is expressed in the following words:—

“Every person having the control or charge of a motor-vehicle shall, when upon a highway and approaching any vehicle drawn by a horse, or a horse upon which any person is riding, operate, manage and control such motor-vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of such horse and to ensure the safety and protection of any person riding or driving the same, and if going in the same direction shall signal his desire to pass and give the rider or driver an opportunity to turn out so that he may be passed with safety.”

This has been the law for seven years at least. It is to be observed that there is not the least ambiguity in the language employed—a signal is to be given of his desire to pass “and,” not “in order to,” give the rider or driver an opportunity to turn out. The signal of the desire to pass is, no doubt, directed so that the driver of the vehicle or the rider of the horse may know that the motorman wants to pass; and, in addition to this signal to be given, the motorman is also to give him an opportunity to turn

App. Div. out. The language of the Act being plain, we need not go to  
1931. *Heydon's Case* (1584), 2 Co. Rep. 18, to find out its meaning.

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Riddell, J.A. The plaintiff had the right to expect that any one who desired to pass would give a signal; and, if no signal was in fact given, I am unable to find that he was guilty of any negligence of which the defendant can complain in not seeing him—it is always to be borne in mind, that there is no such thing in law as negligence at large, there is only negligence in the particular circumstances of the case—the result is that the finding of contributory negligence cannot stand and the judgment of the trial Judge must be set aside in that respect.

As to the appeal in respect of the quantum of damages, we have the undoubted right to set that right if in our opinion it is wrong: *VanCamp v. Anderson and Carter* (1928), 63 O.L.R. 257. I think that the amount of damages the plaintiffs are entitled to has been seriously underestimated, and would amend the judgment in that regard by increasing the amount to \$500 and dismissing the counterclaim with costs. The plaintiffs are entitled to their costs of action and appeal.

MAGEE, J.A.:—I agree that the plaintiffs' damages might well be assessed at more than was allowed by the learned trial Judge, and perhaps \$500—the amount asked in the statement of claim—is not too large a sum.

As to the contributory negligence and counterclaim, the defendant was held responsible for two-thirds of the damages on both sides. He has not appealed against the finding that he was negligent, but resists the plaintiffs' appeal for exemption from the other one-third.

By sec. 42 of the Highway Traffic Act, the onus is upon the defendant to prove that the loss or damage did not arise through his negligence. He has not been able to remove that onus to the satisfaction of a majority of the Court, and therefore the appeal should be allowed.

*Appeal allowed.*

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[GARROW, J.]

ATTORNEY-GENERAL FOR ONTARIO V. ATTORNEY-GENERAL FOR  
CANADA.

1931.

Jan. 26.

*Constitutional Law — Powers of Parliament — Insurance Contracts — Validity of Dominion Legislation — Jurisdiction of Ontario Court to Entertain Action for Declaration that Dominion Statutes Invalid.*

In an action in which either the Attorney-General for Canada or the Attorney-General for Ontario is a party plaintiff and the other a party defendant, the Ontario Court has jurisdiction to make a declaration as to the validity of any statute of the Ontario Legislature or any statute of the Parliament of Canada which purports to have force in Ontario, though no further relief be sought: sec. 19 of the Judicature Act, as enacted in 1930 by 20 Geo. V. ch. 23 (Ont.)

Sections 4, 11, 12, 65, 66, 91, 123, and 135 of the Dominion Insurance Act, R.S.C. 1927, ch. 101, are *ultra vires* the Dominion Parliament; sec. 134 is *intra vires*; and so is sec. 16 of the Special War Revenue Act, R.S.C. 1927, ch. 179.

*Re Insurance Contracts* (1926), 58 O.L.R. 404, and *Re Reference as to the Validity of Certain Sections of Dominion Statutes* (1930), Q.R. 49 K.B. 236, followed.

*Matthew v. Guardian Insurance Co.* (1918), 58 Can. S.C.R. 47, and *Ottawa Separate Schools Trustees v. Ottawa Corporation*, [1917] A.C. 76, distinguished.

Section 507 of the Criminal Code, R.S.C. 1927, ch. 36, has been already declared *ultra vires*: see *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328.

In this action the plaintiff, the Attorney-General for Ontario, asked for a declaration to the effect that the Dominion Insurance secs. 4, 11, 12, 65, 66, 134, and 135 of the said Act are *ultra vires*; or the Parliament of Canada, or, alternatively, a declaration that secs. 4, 11, 12, 65, 66, 134, and 135 of the said Act are *ultra vires*; also a declaration that sec. 507 of the Criminal Code, R.S.C. 1927, ch. 36, and sec. 16 of the Special War Revenue Act, R.S.C. 1927, ch. 179, are likewise *ultra vires*.

By amendment to the statement of claim he also asks an injunction restraining the defendants the Minister of Finance and George D. Finlayson from acting under or enforcing any of the provisions of the Dominion Insurance Act or such of them as may be declared invalid, or a declaration that they are not, nor is either of them, entitled so to act under or enforce any of such provisions.

The action was tried before GARROW, J., without a jury, at a Toronto sittings.

W. N. Tilley, K.C., R. Leighton Foster, and C. F. H. Carson, for the plaintiff.

R. S. Robertson, K.C., and J. T. Garrow, for the defendants.

Garrow, J.      January 26. GARROW, J.:—The plaintiff alleges in his statement of claim that for upwards of 50 years the Province of Ontario has maintained a Department of Insurance, of which he is now and has been for some time the head. During the same period, it is alleged, the Dominion of Canada has maintained an insurance department under the provisions of the Insurance Act, now R.S.C. 1927, ch. 101. The Minister of Finance presides over this Department, and there is provision also for the appointment of a superintendent of insurance, who is the defendant Finlayson.

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The statement of claim goes on to indicate in a general way what the Insurance Act purports to deal with, and it may be convenient here to state in general terms the scope of the Act. By sec. 4, Part I., of the Act, there is provision made for the granting to Dominion, provincial, British, and foreign companies of licences to carry on insurance business throughout Canada or in specified parts thereof, and secs. 11 and 12 prohibit unlicensed companies and persons from carrying on business in Canada and from immigrating into Canada for the purpose of commencing insurance business. Penalties for doing business without a licence are imposed by secs. 65 and 66; deposits of money or securities prior to obtaining a licence must be made and additional sums deposited if the company's Canadian liabilities exceed its Canadian assets. Annual returns by companies so licensed and inspection thereof are provided for, and, on a report by the Superintendent of Insurance that the assets of a company so licensed are insufficient to justify its continuance in business, the licence may be cancelled or suspended or a modified or conditional licence may be issued.

Part II. of the Act deals with life insurance, the amalgamation of companies, the commissions, allowances, and salaries that may be paid to agents and officers, the giving of estimates, the distribution of surpluses, the form of policies, and the terms and conditions which must be included in all contracts of life insurance; Part III. deals with fraternal benefit societies and the terms and provisions of their contracts; Part IV. deals with fire insurance and the conditions of fire insurance contracts; and Part V. with insurance other than fire or life and the regulation of such contracts. There is provision in the statute that, as a condition of the granting of the licences, the contracts of insurance to be

thereinafter entered into shall contain certain prescribed terms and provisions.

The plaintiff also sets up as part of his case that other Dominion statutes contain provisions designed to compel the taking out of licences under the Insurance Act: for example, the Criminal Code, R.S.C. 1927, ch. 36, by sec. 507 makes it an indictable offence to solicit or accept risks without a licence, except as provided in the section; and the Special War Revenue Act, R.S.C. 1927, ch. 179, by sec. 16 imposes on every person in Canada who insures his Canadian property against risks, other than marine risks, with any unlicensed British or foreign company or underwriter, or with any unlicensed association of persons formed for the purpose of exchanging reciprocal contracts of indemnity on the plan known as inter-insurance, a special annual tax, in addition to all other taxes, of 5 per cent. of the total net cost to him of all such insurance for the preceding year. It is the contention of the plaintiff that this is not a *bonâ fide* tax statute, designed for revenue purposes, but an attempt on the part of the Dominion authorities to compel the taking out of a licence under the Insurance Act of Canada.

The defendant the Attorney-General of Canada alleges in his statement of defence that the plaintiff is not entitled to maintain this action for any of the declarations claimed, and that he is not a proper party defendant to the action in any event; that the Court has no jurisdiction to make any of the declarations claimed; that the Insurance Act of Canada was duly enacted by the Parliament of Canada and is within the powers of such Parliament; that the plaintiff has not accurately set forth in his statement of claim the provisions of the Act; and he denies also that the plaintiff has suffered any embarrassment as Minister in charge of the administration of the Ontario Insurance Department, and alleges that if any such embarrassment exists it arises from the claim unnecessarily and gratuitously made by the plaintiff that the Insurance Act is invalid in whole or in part. This defendant, also, maintains that sec. 16 of the Special War Revenue Act is within the legislative competence of the Parliament of Canada.

The other two defendants, the Minister of Finance and George D. Finlayson, also file separate defences, in which, however, each alleges practically the same matter, namely, that the action as framed will not lie; that the Court has no jurisdiction to make

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any of the declarations claimed; that the Insurance Act is within the powers and jurisdiction of the Parliament of Canada; that the Court will not in any event by injunction interfere with the exercise by these defendants of the administration of their respective offices; that the Insurance Act provides for the enforcement of its provisions by way of proceedings before Courts of competent jurisdiction, not only in the Province of Ontario, but throughout the Dominion of Canada; and this Court should not by injunction interfere with the proceedings in such Courts.

The foregoing is a reasonably full statement of the allegations contained in the pleadings filed in the action. The action as originally begun was against the Attorney-General for Canada alone; subsequently by amendment the other two defendants were added and appropriate amendments were made to the statement of claim and a prayer added for relief by way of injunction.

The allegation that no such cause of action as the plaintiff asserts here lies, and that the Court has no jurisdiction in the matter, was very strenuously argued by counsel for the defendants, their contention being in fact that the action was of such a novel character as to make the question of jurisdiction almost as important as the question of the merits themselves.

Counsel for the plaintiff, in maintaining his right to sue in the present form and for the relief claimed, contend that the class of legislation in question here is legislation that sets up a department of Government under which certain persons, the Minister and Superintendent, are given certain rights and certain powers of control, the exercise of which interferes directly with the carrying on of the Insurance Department of Ontario under the Ontario Insurance Act. It sets up, they claim, a rival department which assumes to exercise the very same kind of control, although perhaps not on the same terms as the provincial authority, and the plaintiff says that this is a wrongful exercise of legislative authority, and that he, as the official in charge of the Insurance Department of Ontario, is prejudiced and embarrassed in the exercise of his legal rights.

Mr. Tilley maintains that this position taken by the plaintiff brings him within the authority of the very well-known and often cited case of *Dyson v. Attorney-General*, [1911] 1 K.B. 410.

Counsel for the defendants, on the other hand, maintain with great force that the Court is quite without jurisdiction and that

such an action as the present does not lie; that the plaintiff is not a proper plaintiff and that the defendants are not proper defendants; that, if there is any embarrassment at all, which he denies, it is not for the plaintiff to complain nor is it he who is embarrassed; and that the *Dyson* case has no application; and they refer to such cases as *In re Clay*, [1919] 1 Ch. 66, as indicating the limitation of the application of the principle of the *Dyson* case. They contend that all the Court is asked to do here is to make a declaration upon a pure question of law, and that no rights in the proper sense of the word are actually being determined at all.

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I do not propose, although the question is an interesting and important one, to spend much time discussing it, because it seems to me that the matter is settled, so far as I am concerned, by an amendment made to the Judicature Act assented to on the 3rd April, 1930, and appearing as ch. 23 of the statutes of 1930 (Ontario). This amendment, which I think was not referred to on the argument, repeals sec. 19 of the Judicature Act, R.S.O. 1927, ch. 88, and substitutes the following therefor:—

“19.—(1) In any action in which the Attorney-General of Canada or the Attorney-General of Ontario is a party plaintiff and the other Attorney-General is a party defendant, the court shall be deemed to have had and shall have jurisdiction to make a declaration as to the validity in whole or in part of any statute of this Legislature or any statute of the Parliament of Canada, which, by its terms, purports to have force in Ontario though no further relief be prayed or sought.

“(2) The judgment in any such action shall be subject to appeal as in ordinary cases.”

Whether this amendment was enacted for the very purpose of overcoming the point raised by the defendants, I do not know; but it seems to be applicable to the case in hand, and it not only purports to give to the Court jurisdiction to make a declaration as to the validity in whole or in part of any statute of the Legislature or of the Parliament of Canada which by its terms purports to have force in Ontario, in any action in which either Attorney-General is a party plaintiff and the other is a party defendant, but it also declares that the Court shall be deemed to have had jurisdiction to make such declaration. In my opinion, the statute is quite explicit; and, if there was any doubt about the jurisdiction, it would appear to have been set at rest by the amendment

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referred to (unless and until perhaps its validity is to be questioned); and I therefore conclude that the jurisdiction exists and must be held to have existed at the time the action began, and I proceed to deal with the merits of the case itself.

As indicating the difficulties created, as the plaintiff says, by having two rival Departments of Insurance, the evidence of H. B. Armstrong, Deputy Superintendent of Insurance for the Province of Ontario, was taken. The Superintendent and his deputy are appointed under the authority of the Ontario Insurance Act, R.S.O. 1927, ch. 222, sec. 3, and the Superintendent is thereby given general supervision over the business of insurance in Ontario and he is required to see that the laws relating to the conduct thereof are enforced and obeyed. He, Armstrong, illustrates his difficulties by giving an instance, which he says frequently occurs, of a foreign company desiring to commence insurance business in the Province of Ontario applying for permission to do so to the Provincial authorities, and the latter, while holding the view that the foreign company could properly be licensed directly by the local authority, are yet obliged to tell the applicant that, if it commences operation without a Dominion licence, it will probably be in immediate difficulties with the Dominion authorities.

He also referred to instances of a company organised under the laws of another Province subsequently obtaining a licence from Ottawa and then applying for a licence to do business in Ontario, and as a consequence, so he contends, the provincial authorities are embarrassed in not knowing whether to apply the requirements of the Ontario laws as to a company coming from another Province to Ontario, or the law as to a Dominion company coming into Ontario.

The witness also referred to what he contends is a conflict of provisions between the Ontario statute and the Dominion statute as to the conditions to be attached to policies written in regard to accident and sickness insurance, and he pointed out that, while provincially licensed companies adopt, as they are required to do, the statutory conditions imposed by the Ontario law, Dominion-licensed companies, doing business in Ontario, adopt the red ink variation contained in, for example, exhibit 2, in order to comply with the requirements of the Dominion statute as to statutory conditions. As to this ground of embarrassment it should be pointed out that subsec. 4 of sec. 134 of the Dominion statute, which in its earlier subsections provides for a lengthy series of

statutory terms and conditions to be contained in policies issued in respect of bodily injury or death, provides that any of those conditions which are inconsistent with terms or provisions required to be contained in the policy by the laws of the Province in which the policy is issued, shall not, to that extent, be required to be contained in the policy. No similar provision is to be found in the Dominion statute as to the subjects dealt with by sec. 91 (life insurance), 123 (fire insurance), or 135 (automobile insurance).

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Several other instances or illustrations of what is meant by the embarrassment referred to in the statement of claim were given. I do not think I need refer to them at greater length than I have done. If, apart from the amendment of 1930 already referred to, it might have been regarded as necessary to give this evidence, I do not now think that it was, in view of the amendment. Nor, of course, does mere embarrassment, of the kind described by the witness, assist in determining the validity of the legislation, which must be determined upon established principles as laid down in the decided cases and not upon any question of embarrassment or difficulty in administering the law in question.

Reference was made at length by counsel on both sides to the case reported in (1926) 58 O.L.R. 404, under the name of *Re Insurance Contracts*. That was a decision of the Second Divisional Court of the Appellate Division upon a case referred thereto, pursuant to the Constitutional Questions Act, as to the validity or otherwise of secs. 168 and 180 of the Ontario Insurance Act, and as to whether, if they were held to be validly enacted, it was within the legislative competence of the Parliament of Canada to enact such provisions as are contained in certain specified sections of the Dominion Insurance Act, those sections as they now appear in the Revision of 1927 being secs. 11, 12(1), 65, 66, and 135.

By a majority of the Court it was held that it was within the competence of the Legislature to enact the provisions of the Ontario Insurance Act referred to, and that it was not within the legislative competence of the Parliament of Canada to enact the provisions of the Dominion Insurance Act referred to. Masten, J.A., delivered the judgment on behalf of the majority of the Court; Middleton, J.A., assented thereto, as likewise did Riddell, J.A., with some doubt; while Latchford, C.J., and Smith, J.A., dissented in part.

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The Minister of Justice was notified, in the usual manner, of the hearing before the Appellate Division, but did not appoint counsel to attend, and the Court directed that Sir William Hearst argue the matter from the point of view of the Dominion authorities. After argument, and as the result of a suggestion made by the Court, the order in council submitting the questions was enlarged and amended, and it was thereby provided that it should be understood that the questions submitted and argued should be the questions contained in the amended order in council. Of this amended order in council the Minister of Justice received no express notice, and the contention is that the binding authority of the decision is thereby weakened, if not destroyed, and that I should not be obliged to follow it. I do not follow this argument. Even if I were inclined to a different view from that expressed by Masten, J.A., which I am not, I should still, I think, be obliged to accept the opinion expressed by him and assented to by Riddell and Middleton, J.J.A.; and, to the extent at least to which that case goes, I think I must follow it.

In the judgment of Masten, J.A., the authorities are fully referred to, and I do not think it at all necessary, if it would not be an impertinence on my part, to cover the same ground again, and I content myself with pointing out what appear to me to be the particularly important portions of the judgment. It was assumed by Masten, J.A. (p. 416), "that the Dominion Parliament is competent to grant to a company incorporated by it a status as a Dominion corporation, to confer upon it its capacities, to endow it with powers, and to prescribe limitations on those powers," but he goes on to say that "the granting of subjective status and powers of the company is one thing, and the regulation of the objective exercise of its powers in a particular Province is quite another thing."

Further, on pp. 416 and 417, of 58 O.L.R.:—

"It seems to me self-evident that the conditions which a Dominion company, after it has been incorporated and organised, chooses to insert in its policies of insurance have nothing whatever to do with its prior incorporation. In other words, the Dominion legislation here in question is not aimed to create or to control or limit the status, powers, or field of operation of the companies referred to in the statute, but rather to control its subsequent operations by prescribing certain minor details of the contracts into which the citizens of Ontario may enter with such

companies and persons, and so to regulate the business of insurance.”

Again, at p. 420:—

“With respect to British insurance companies, British natural persons, alien insurance companies, and alien persons, seeking to carry on the business of insurance in Canada, the considerations to be observed in reaching a conclusion are for the most part similar to those which obtain in considering the case of Dominion companies, and need not be repeated. Some further points, however, present themselves in that connection. The decision of the Judicial Committee in the case of *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588, determines that the power of restricting in Canada, by a system of licensing, the business of foreign insurance companies, is given to the Dominion by the heads in sec. 91” (of the British North America Act) “which refer to the regulation of trade and commerce and to aliens.”

“It may, therefore, be assumed that if a foreign insurance company, empowered by its constituting instruments to carry on the business of both life and guarantee insurance, were to apply for a Dominion licence to carry on its business in Canada, the Dominion Parliament might permit it to carry on life insurance, and decline permission to carry on concurrently guarantee insurance, or might impose a condition that it deposit so many thousands of dollars with the Insurance Department of Canada as a guarantee to its policy-holders. It may also be assumed that any alien, whether a foreign company or a natural person, coming to Canada to carry on the business of insurance, must be licensed by Dominion authority, and only to the extent to which such alien is so licensed and on the conditions prescribed by the Dominion will he or it be legally entitled to commence business; but, when the alien has complied with the conditions prescribed and the licence issues, the functions of the Dominion authority are exhausted, and the details of the contracts of insurance which it subsequently makes with the citizens of Ontario do not fall under the head of licensing (though they may be a consequence of the licensing) but under the head of civil rights in whatever Province the licensee carries on business.

\* \* \* \*

“Nor, in my opinion, is this enactment ‘ancillary,’ in the sense

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Further, at p. 422, Mr. Justice Masten intimated "that where the condition sought to be imposed by the Dominion has the effect of trenching on any of the enumerated powers which are exclusively entrusted to the Provincial Legislature by sec. 92, the right to impose and enforce such a legislative condition must as to its constitutional validity be considered and tested by the same principles as those which are applicable to direct legislation, for it is well established that the Dominion Parliament cannot do indirectly what it cannot do directly."

Towards the end of his judgment (at p. 422) he concludes that "the legislation in question is an attempt by this indirect method to regulate the business of insurance in the Provinces of Canada so far as it is conducted by the classes of companies and persons above named, and that its form is adopted under the guise of legislation respecting trade and commerce and respecting aliens in order to cloak a regulation of the business of insurance."

And at p. 423: "Apart from such legislation as is here in question, any insurance company, foreign or domestic, and any natural person (not an enemy), might under the rules of comity enter Canada and carry on the business of insurance. Apart from this legislation the citizens of Ontario could contract with British and with alien insurance companies without let or hindrance, and their contracts would be valid and enforceable in accordance with the statutory conditions prescribed by Ontario law. But if and so far as the legislation in question has validity, the citizens of Ontario cannot any longer contract insurance with British or alien companies on the conditions and terms prescribed by the laws of Ontario, but only on the terms prescribed by this legislation."

Counsel for the defendants rely strongly upon the case of *Matthew v. Guardian Insurance Co.* (1918), 58 Can. S.C.R. 47, a decision apparently not referred to either by counsel or the Court in the *Insurance Contracts* case, *supra*. In that case, Matthew, as prospective attorney of the Guardian Fire Insurance Company of Utah, made application for a licence under the British Columbia Fire Insurance Act. The Guardian Assurance Company, a British company, brought an action to restrain Matthew from applying for the licence and its action was dismissed. Between the trial and the hearing of the appeal in the Court of Appeal of British

Columbia, the statute 7 & 8 Geo. V. ch. 29 (Canada), amending the Insurance Act (Canada), was passed, and secs. 4 and 11, as so amended, provided that a foreign insurance company could not carry on its business in Canada unless and until it had obtained a licence from the Minister of Finance. It was held in the Supreme Court of Canada that the Court of Appeal should have taken judicial notice of the amendments, and that, since the Utah company was not able, through the issue of a provincial licence alone, to transact business in British Columbia before having obtained a Dominion licence, the proceedings by way of injunction were premature.

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Several of the Judges of the Supreme Court of Canada in delivering judgment referred to the history of the legislation in question, but it is clear, I think, that its constitutional validity as legislation was not an issue in the action nor upon the appeal. It is assumed, and is not, I think, seriously disputed by any one, that the Dominion Parliament is empowered to insist upon a foreign company, which proposes to come into Canada, obtaining a licence before commencing operations, but the conditions attached to the licence and the question whether those conditions would or do conflict with provincial rights were not considered, and I am unable to agree that the decision in this case is necessarily opposed to that in the *Insurance Contracts* case.

The vice of the legislation in question appears to be that the Dominion Parliament seeks to impose, upon those obtaining licences, obligations as to the terms and conditions upon which insured and insurer shall do business and enter into contracts, matters which, as I read the authorities, are expressly for the Provincial Legislature. Section 4, for instance, provides that it shall be competent for the Minister to grant a licence authorising the licensee to carry on business *subject to the provisions of this Act and to the terms of the licence*, and secs. 91, 123, 134, and 135 deal in minute detail with the terms and provisions that are to be inserted in the policy to be issued by the licensee and provide that it shall be a condition of the licence that these conditions shall be set out in the policy, or in default the licence may be cancelled. As already mentioned, the sections last referred to deal respectively with companies proposing to take out licences in respect of life (91), fire (123), accident and sickness (134), and automobile insurance (135), and only in regard to sec. 134 does the Act provide (subsec. 4) that, in so far as the conditions imposed by that section are inconsistent with the conditions required by the law of

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the Province, they need not be observed. Why this distinction is made I do not know, but it seems clear that in regard to all other classes of insurance dealt with by the Act a licensor under the Act must insert these terms in its policy whether they agree or not with the requirements of the Provincial Act. One would have thought it would have been quite sufficient to impose as a condition of obtaining and continuing to hold its licence that a company should be required to insert in its policies such requirements, terms and conditions, as might be necessary by the law of the Province in which its policies were from time to time issued, and if some such provision as that were contained in the sections referred to, I for my part can see no great objection to them in other respects.

Again, sec. 11 makes it unlawful for any Canadian company or any alien, whether a natural person or a foreign company within Canada, among other things, to solicit or accept any risk, issue or deliver any policy, receive any premium, inspect any risk, or adjust any loss, under a licence issued under the Act; and sec. 12 makes it unlawful for any British company or for any British subject not resident in Canada to immigrate into Canada for the purpose of transacting the business of insurance unless under a similar licence granted pursuant to the Act.

Recently in the Province of Quebec a question as to the validity of secs. 11, 12, 65, and 66 of the Insurance Act of Canada and of sections 16, 20, and 21 of the Special War Revenue Act, R.S.C. 1927, ch. 179, was submitted to the Court of King's Bench (appeal side) of that Province, and I have read the judgments of the Court upon the questions submitted: *Re Reference as to the Validity of Certain Sections of Dominion Statutes* (1930), Q.R. 49 K.B. 236. The members of the Court were not by any means unanimous except in regard to the sections of the War Revenue Act, as to which all agreed that those sections were within the competence of Parliament.

The specific question asked as to the Insurance Act was the following:—

“Is a foreign or British insurer who holds a licence under the Quebec Insurance Act to carry on business within the Province obliged to observe and be subject to sections 11, 12, 65, and 66 of the Insurance Act of Canada, or are those sections unconstitutional as regards such insurer?”

Mr. Justice Allard held these sections to be constitutional. Mr. Justice Tellier held that they were unconstitutional. Mr. Jus-

tice Howard held that they were constitutional as to foreign companies, but was doubtful as to their constitutionality as to British subjects. Mr. Justice Bernier held that the sections were unconstitutional. Mr. Justice Bond held that they were constitutional as to foreign companies and unconstitutional as to British. As to the British insurer, therefore, it appears that the majority of the Court clearly held these sections to be unconstitutional.

Counsel for the plaintiff contend in the present case, primarily, that the whole statute should be declared *ultra vires* and he refers to the case of *Ottawa Separate Schools Trustees v. Ottawa Corporation*, [1917] A.C. 76, as authority for the view that, where it is impossible to separate the good from the bad in a statute of questionable validity, and where it is impossible to ascertain whether, if the invalid sections had never been enacted, those that remain would have been, the whole should be declared bad.

Whether that case is authority for the proposition stated I do not know, but in my opinion it does not apply here. Many of the sections of the statute are of undoubted validity. As already pointed out, it is, I think, conceded that Parliament has the right to license on proper terms and conditions and has undoubtedly the right to control companies of its own creation. Mr. Tilley himself concedes that Parliament may set up an insurance department and appoint a superintendent of insurance and provide for what he may do, but it is really the compulsory features of the statute that are particularly objected to, and the sections which impose, as conditions upon which the licence shall issue, limitations upon the freedom of contract as between the insurer and the insured.

I do not propose to refer at any length to the authorities relied upon by Mr. Justice Masten. It has been held in the case of *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, that the Province has the right to enact statutory conditions as to insurance and that the authority vested in Parliament to legislate in respect of trade and commerce does not apply to the regulation of the business of fire insurance in a single Province. It has also been held in *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588, that the power to legislate as to the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the Province, although it was also held in the same case that the Dominion Parliament has power by properly framed legislation to require a foreign company to take out a licence from the Dominion authori-

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It was also held in *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328, that sec. 508 (c) of the Criminal Code, a section which makes it an indictable offence for any one within Canada, except on behalf of or as agent for a company duly licensed by the Minister of Finance, or on behalf of or as agent for or as a member of an association of individuals formed upon the plan known as Lloyds, or of an association of persons formed for the purpose of interim insurance, to solicit or accept any insurance risk, issue or deliver any interim receipt or policy of insurance, or grant in consideration of any premium or payment any annuity on a life or lives, or collect or receive any premium for insurance, etc., etc., was void as beyond the competence of Parliament, because although Parliament undoubtedly has the exclusive right to legislate in respect of criminal law, yet the enactment in question was in substance one relating to the regulation of contracts of insurance, subjects not within the legislative sphere of the Dominion. Notwithstanding this decision, the section in the Code still remains unrepealed.

My conclusions, therefore, on the whole case, are as follows:—

In my view sec. 4 is invalid, not because it purports to give the Minister power to grant a licence, but because it attaches to the granting of the licence terms and conditions which appear to me to be not within the competence of Parliament.

I am also of opinion that secs. 11 and 12 of the Act are likewise *ultra vires*.

Sections 65 and 66 are the sections in the Act relating to penalties. They have already been held invalid by Masten, J.A., and I come to the same conclusion.

The sections which impose the statutory conditions to be inserted in the policies as a condition of the granting of the licence have already been referred to. These sections are 91, 123, 134, and 135. For the reason that sec. 134 does not make it compulsory to insert these conditions where they conflict with provincial conditions, I would hold that that section is *intra vires*, but the others I would hold to be *ultra vires*.

As to sec. 16 of the Special War Revenue Act, R.S.C. 1927, ch. 179, I am inclined to the view adopted unanimously by the Quebec Court that that section should not be declared to be *ultra vires*. The section is as follows:—

"Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of insurer of such property, against risks other than marine risks,

"(a) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act to transact business in Canada: or

"(b) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association, or of its principal attorney-in-fact is situate outside of Canada,

"shall on or before the 31st day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute, a tax of five per centum of the total net cost of such person of all such insurance for the preceding calendar year."

The argument is, of course, that in its pith and substance this is not a tax, in the proper sense of the word, for the purpose of raising revenue, but is in fact an indirect method adopted by Parliament of compelling insurers to come within the Dominion fold in regard to insurance matters. I confess it has that appearance, but undoubtedly Parliament has the right to tax and to select and determine its method of taxation, and it would be, I think, very dangerous for Courts to interfere except in the plainest possible case with that right.

As to the section of the Criminal Code referred to, which, notwithstanding the decision as to its invalidity, still stands unrepealed, I think it unnecessary that I should do anything more than note the fact that the section has been already declared to be unconstitutional.

My judgment, therefore, will be in accordance with the foregoing.

The plaintiff is entitled to his costs of the action.

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## [IN CHAMBERS.]

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REX EX REL. WATSON V. BODDY.

Jan. 28. *Municipal Corporations—Election of Deputy Reeve of Township—Disqualification of Successful Candidate—Non-payment of Taxes—Municipal Act, sec. 53, subsec. 1 (r)—Claim of Seat by Unsuccessful Candidate—Absence of Notice of Disqualification—Sec. 181 of Act.*

A candidate for the office of Deputy Reeve of a township, who was declared duly elected, was found to be disqualified by reason of the fact that he had not before or on the day of his nomination paid the taxes chargeable against him (Municipal Act, R.S.O. 1927, ch. 233, sec. 53, subsec. 1 (r)).

The relator, who was a candidate at the election, claimed the seat, although he had not received a majority of the votes:—

*Held*, that, as no notice of disqualification of the other candidate had been given to the electors before or at the nomination, the seat could not be awarded to the relator.

*Rex ex rel. Hooper v. Jackson* (1927), 60 O.L.R. 264, applied.  
Section 181 of the Act considered.

MOTION on behalf of the relator, Joseph W. Watson, who was a candidate for election as Deputy Reeve for ward No. 1 in the township of North York, at the recent municipal elections, for an order declaring that the respondent was not duly elected to the office of Deputy Reeve. The relator also asked for an order declaring that he himself was duly elected to the said office, and therefore entitled to be admitted forthwith to that office.

January 27. The motion was heard by WRIGHT, J., in Chambers.

*T. N. Phelan*, K.C., for the relator.

*J. D. Lucas*, for the respondent.

January 28. WRIGHT, J.:—The grounds of attack on the election are that the respondent had not, on the day of the nomination preceding the election, duly paid the taxes chargeable against him, and therefore he was disqualified under sec. 53, subsec. 1 (r), of the Municipal Act, R.S.O. 1927, ch. 233.

Upon the argument it was conceded that the respondent had not in point of fact paid his taxes prior to his nomination, although it was contended that he had been under the mistaken belief that he had paid his taxes prior to that date. Upon the admitted facts the respondent was clearly disqualified from being a candidate or being elected at the said election, so that he cannot retain his seat as Deputy Reeve, and an order will be made to that effect.

Mr. Phelan strenuously contended that, as the respondent was disqualified from being a candidate, the relator was entitled to be

declared elected. In support of this argument he relied on the provision of sec. 181 of the Municipal Act.

A reference to this section will shew that subsec. 1 provides for two contingencies:—

(1) The case of a person found not to have been duly elected.

(2) The case where it is determined that some other person was duly elected.

The contention of the relator is that this case falls within the second class. In my view, this section does not apply to the present case, but to a case where a candidate who had not received a majority of votes was declared elected by the Returning Officer or to a case such as that dealt with by subsec. 3 of sec. 180 of the Municipal Act, which provides that where the candidate declared to be elected was guilty of bribery there shall be struck off the number of votes given for such candidate, one vote for each voter who was bribed. If after such votes were deducted the respondent was in a minority, the provisions of sec. 181 could be applied.

These are the only two cases in which, I think, it could be held that a candidate who had not received a majority of votes at the election should be admitted to the seat.

I attach considerable weight to the geography of sec. 181, following as it does immediately after a section providing for the striking off of votes from one of the candidates.

There is a long line of decisions in the Upper Canada and Ontario Courts which deal with situations such as exist in the present case. The earliest cases I have been able to find are *Regina ex rel. Hervey v. Scott* (1853), 2 C. L. Chrs. 88; *Regina ex rel. Tinning v. Edgar* (1867), 4 P.R. 36; and *Regina ex rel. Ford v. McRae* (1870), 5 P.R. 309. In the following and more recent cases, viz., *Rex ex rel. O'Donnell v. Broomfield* (1903), 5 O.L.R. 596, *Rex ex rel. Robinson v. McCarty* (1903), 5 O.L.R. 638, and *Rex ex rel. Zimmerman v. Steel* (1903), 5 O.L.R. 565, the same principles were enunciated. These decisions establish clearly that unless the objection to the qualifications of a candidate is stated at the nomination, so as to afford the electors an opportunity of nominating a candidate who has the proper qualifications, the seat cannot be awarded to another candidate who has not the majority of votes. There is no suggestion in the present case that any notice of disqualification of the respondent was given to the electors prior to or at the nomination.

As pointed out by Mr. Justice Middleton in *Rex ex rel. Hooper v. Jackson* (1927), 60 O.L.R. 264, the policy of the Courts is

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Wright, J. strongly against placing in office those in whom the electors have  
 1931. not shewn confidence by their votes. It would be a travesty on  
 REX EX REL. municipal elections if a candidate who received a very small num-  
 WATSON ber of votes should be awarded the seat in the event of his success-  
 v. ful opponent being declared disqualified from being a candidate  
 BODDY. owing to his failure to pay his taxes.

In the result there will be an order declaring that the respon-  
 dent was not duly elected, and directing a new election to be held.  
 The relator will be entitled to his costs.

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[APPELLATE DIVISION.]

1931. COMMERCIAL FINANCE CORPORATION LTD. v. CAPITAL DISCOUNT  
 Jan. 23. CORPORATION LTD.

*Sale of Goods—Loan Made to Purchaser by Finance Corporation—Bill of Sale and Conditional Sale Agreement—Method of Securing Loan—Instruments in Substance Amounting to Chattel Mortgage—Failure to Register as such—Instruments Void as against Subsequent Bonâ Fide Purchaser for Value—Bills of Sale and Chattel Mortgage Act, R.S.O. 1927, ch. 164, secs. 1(d), 4, 7, 21—Conditional Sales Act, R.S.O. 1927, ch. 165, sec. 2(4).*

L., a dealer in motor-cars, being about to buy a car from the L. M. company, and requiring money for the purpose, applied to the plaintiff for the money, which it, being in the business of "financing cars," lent to him. Two documents were executed—a bill of sale by L. to the plaintiff, whereby the title and ownership of the car were transferred to the plaintiff, and an agreement for a conditional sale by the plaintiff to L.:—

*Held*, that in substance the transaction was a mortgage of the car by L. to the plaintiff; and the plaintiff's rights as against the defendant, which had seized the car by virtue of a subsequent assignment to it from L., were governed by the Bills of Sale and Chattel Mortgage Act.

The definition of "mortgage" in that Act, sec. 1(d), includes a conveyance intended to operate as a mortgage, and that definition was applicable to the bill of sale or to both instruments combined; but the affidavits of execution and *bonâ fides* required by sec. 4 were not made nor were the documents registered as required by sec. 21, though the conditional sale agreement was registered under the Conditional Sales Act; and so, the defendant becoming a purchaser in good faith and for value within the meaning of sec. 7 of the Bills of Sale and Chattel Mortgage Act, the plaintiff could not as against the defendant succeed in its action for the return of the car.

THIS action was brought in the County Court of the County of York to recover from the defendant corporation the sum of \$1,146, and interest thereon, as provided in a certain promissory note made by one William Lind, which fell due on the 7th July, 1929, or, in

the alternative, for the return of a certain motor-vehicle which, as the plaintiff corporation alleged, the defendant corporation seized and converted to its own use, and for damages for the conversion.

The action was tried before LEE, JUN. Co. C.J., who gave judgment in favour of the plaintiff corporation for the recovery of \$1,146 and interest, finding that the vehicle had been sold by the defendant corporation and that it was impossible for the plaintiff corporation to obtain its return, and that there was no evidence of any other damage suffered by the plaintiff corporation.

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The defendant corporation appealed from the judgment of the County Court.

March 23 and September 25, 1930. The appeal was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, JJ.A.

*J. C. McKuer*, K.C., for the appellant corporation.

*F. J. Hughes*, K.C., for the plaintiff corporation, respondents.

January 23, 1931. ORDE, J.A.:—The circumstances surrounding the inception of the plaintiff's rights in respect of the motor-car in question are so extraordinary as to require careful examination.

On the 4th April, 1929, one Lind, a dealer in motor-cars, purchased from a firm, known as Leggatt Motor Sales, an Oakland motor-car bearing the serial number 11041 and the engine or motor number 270332. The purchase-price was \$1,349 and was paid in two distinct sums, one of \$232 by a cheque of Lind's for that amount, and the balance by moneys which came from the plaintiff. It is not suggested that the plaintiff became the purchaser of the car from Leggatt by way of substitution for Lind. The statement of claim alleges that any title the plaintiff acquired was by the bill of sale from Lind about to be mentioned.

On the same date, that is the 4th April, 1929, Lind executed an instrument which in substance is a bill of sale, whereby, in consideration of the sum of \$1,349 acknowledged to have been paid to him by the plaintiff, he sold and assigned to the plaintiff the motor-car in question absolutely. Lind as vendor warranted his title thereto, and undertook to comply with the plaintiff's orders for the delivery thereof and to retain and safeguard the same as the property of the plaintiff. The instrument purports to be an indenture and to be executed under seal; but, though it is signed by Lind, there is no seal or anything imposed or impressed upon the

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document by ink or otherwise which by any stretch of the imagination might serve as a substitute therefor. There are no affidavits of *bona fides* or of execution, and the instrument was not registered as required by the Bills of Sale and Chattel Mortgage Act, R.S.O. 1927, ch. 164. At no time did the plaintiff have possession of the car.

On the same date, that is the 4th April, 1929, a further instrument was executed, which was put in as a conditional sale agreement between the plaintiff as "seller" and Lind as purchaser (described throughout the agreement as the "dealer") for the conditional sale of the car to Lind. The purchase-price is stated to be \$1,349, of which \$203 is acknowledged as having been paid, and the balance, \$1,146, is to be secured by the promissory note of Lind payable three months after date. There are several odd things about the two exhibits (Nos. 3 and 4) put in at the trial to prove this agreement. Exhibit 3 is apparently an original and presumably a duplicate, as exhibit 4 is a certified copy, from the office of the County Court clerk, of the same instrument. Exhibit 3 is a printed form, but the space intended for the insertion of the seller's name is not filled in, nor is the instrument executed by the seller at all. It is signed by Lind alone. It purports to be executed under seal, but there is no seal except the printed letters "L.S." in parenthesis opposite his signature. Accompanying it is a promissory note for \$1,146 signed by Lind in favour of the plaintiff.

Exhibit 4 is a certified copy of the same instrument from the office of the County Court clerk. In it the plaintiff's name appears as seller, and it is to be presumed that the certified copy is correct, and that the name so appears in the registered duplicate of exhibit 3. The duplicate appears also to have been signed by Lind alone, though the form of this instrument clearly indicated that it was intended to be executed by the plaintiff corporation as well as by the purchaser.

On the 6th May, 1929, by an instrument in writing (exhibit 1) Lind agreed to sell the car to Elsa Anne Robinson and Charles W. Robinson for \$1,650, of which \$550 was acknowledged to have been paid in cash, and the balance of \$1,100, to which was added an item called a "service charge" of \$149, making in all \$1,249, was to be paid in 12 monthly instalments at the office of the Capital Discount Corporation Limited, the defendant. The Robinsons also signed a promissory note in favour of Lind for the \$1,249, payable in 12 instalments, as stipulated by the agreement, and

Lind endorsed the note to the defendant. By an endorsement upon the agreement Lind also assigned and transferred the agreement and the property covered thereby and the note, etc., mentioned therein to the defendant. On the 7th May, 1929, Lind drew a draft upon the defendant for \$1,100 in favour of the Dominion Bank (exhibit 11), and on the 8th May, 1929, the defendant paid the draft to the Dominion Bank and took over the conditional sale agreement with the Robinsons (exhibit 1) and their promissory note for \$1,249. The payment to the bank is in the form of a cheque for \$1,478.85 (exhibit 12). That cheque also covered another draft of Lind's for \$377, which has no bearing upon this transaction, and \$1.85 for bank exchange upon the two drafts.

The conditional sale agreement between Lind and the Robinsons (exhibit 1) was registered on the 10th May, 1929. As between the plaintiff and the defendant this registration has no bearing on the question in issue, as the plaintiff is not claiming as a subsequent purchaser or mortgagee from Lind.

There was a great deal of evidence at the trial as to whether or not the car sold by Lind to the Robinsons was the same car as that originally purchased from Leggatt by Lind and now claimed by the plaintiff. This all arose from the fact that in the conditional sale agreement between Lind and the Robinsons, under which the defendant claims, the serial number of the car was given as 1270332. It was clear that there could not have been an Oakland car with that serial number. And it seems fairly evident that there was a mistake in so describing the car. The engine number of the car in question was 270332, and there might have been not only the mistake of adding the figure 1 before the number, but some confusion between the serial number and the engine number. It is to be noted that in a document signed by the Robinsons on the 7th May, 1929, agreeing to purchase the car, some one has written in pencil over the words "Ser. No." the word "Eng." and there is added "Ser. 11041" in pencil, which has been struck out and the letters "O.K." written against it. What this all means may be guess-work, but there can be no doubt upon the evidence that the car which the Robinsons were buying or purporting to buy was the car in question.

I say "purporting to buy" because there is some evidence to indicate that the sale to the Robinsons was to some extent fraudulent, in that it was made because of some indebtedness on Lind's part to them or one of them. But there was no evidence to indicate that the defendant knew of any fraud, if there was fraud, or acted

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otherwise than in good faith in purchasing the conditional sale agreement from Lind upon the security of the car and the Robinsons' obligation to pay for it. That Lind was guilty of a fraud upon either the plaintiff or the defendant is of course plain, and the only question is as to which is to suffer.

The learned trial Judge treats the initial transaction between the plaintiff and Lind as a conditional sale by the plaintiff to Lind, whereby the property in the car remained in the plaintiff until payment of the purchase-price, and holds that nothing that happened afterwards could affect the plaintiff's title, its agreement being duly registered.

Now if this were the real position of the plaintiff, some question might arise under subsec. 4 of sec. 2 of the Conditional Sales Act, R.S.O. 1927, ch. 165. Lind, being a dealer in motor-cars, the delivery of this car to him was undoubtedly for the purpose of resale in the course of business, and a *bonâ fide* purchaser in the ordinary course of business would acquire a title even as against the plaintiff by virtue of subsec. 4.

Whether or not the sale by Lind to the Robinsons was a *bonâ fide* sale in the course of business, and to what extent, if any, the character of that sale affected the defendant's title as a purchaser for value in good faith, might be nice questions which, in the view I take of the plaintiff's title, I do not think it necessary to decide.

The sole foundation for the plaintiff's claim for relief in this action is that it is the owner of the car, that Lind never acquired any title to it, and that, the instrument being duly registered, the plaintiff's title holds against all the world. And the trial Judge has in effect so held.

But the real nature of the transaction between the plaintiff and Lind appears to have been completely overlooked. Lind, being about to buy the car, and requiring money for the purpose, applied to the plaintiff for the money. What took place as a result of this application is best stated in the words of Morrison, the accountant of the plaintiff corporation, upon his cross-examination. After he had stated that the company is in the business of financing cars and not in the business of dealing in cars, his cross-examination proceeds:—

“Q. As a matter of fact you never actually bought this car from Lind, did you? The mere fact of his signing this document does not actually say . . . A. We have the document giving us the title.

“Q. But you never actually had the car in your possession? A. We never had it in our possession, no.

"Q. As a matter of fact you just loaned Lind some money? A. Yes.

"Q. And he gave you the title to this car? A. Gave us the title of the car.

"Q. That was all you did, you loaned Lind some money? A. Yes.

"Q. And he handed you back this agreement? A. Yes.

"Q. And he is charged up by you this \$1,146? A. Yes.

Q. You say you gave him this \$1,146? A. That is the advance he obtained."

Now upon this evidence is it not established beyond question that the real transaction between Lind and the plaintiff was a loan of money by the plaintiff to Lind upon the security of the car? And the instruments executed by Lind, who undoubtedly became the owner of the car by his purchase from Leggatt, were in fact intended to secure the repayment of the loan.

The documents so executed were the bill of sale by Lind to the plaintiff (exhibit 2), whereby the title and ownership of the car were transferred to the plaintiff, and the conditional sale agreement by the plaintiff to Lind (exhibits 3 and 4). But is it possible in the circumstances to separate what was really one transaction and make two distinct and independent transactions out of it? There was no real sale by Lind to the plaintiff. The bill of sale was not intended to give the plaintiff an absolute title to the car. Its sole purpose was to vest the title to the car in the plaintiff as a foundation for the conditional sale to Lind. But both transactions were intended to vest the car in the plaintiff to secure payment of the money lent to Lind. In other words, the real transaction was in very truth and substance a mortgage of the car by Lind to the plaintiff.

Were it not for the provisions of the Bills of Sale and Chattel Mortgage Act, the form of the transaction would be of no consequence. A mortgage may be given in many forms, and an instrument which in form transfers the absolute title to the transferee will be held to be a mortgage if in fact it is given as security, as in the case of a conveyance of land. And there would be no difficulty here in treating the transaction as a mortgage as between Lind and the plaintiff, because that is what it was, though its terms were embodied in two instruments.

But the plaintiff's rights as against the defendant are governed by the provisions of the Bills of Sale and Chattel Mortgage Act.

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1931. operate as a mortgage. That definition is clearly applicable to the  
bill of sale (exhibit 2) or to the bill of sale and conditional sale  
COMMERCIAL agreement (exhibits 3 and 4) combined. Section 4 requires an  
FINANCE affidavit of an attesting witness and an affidavit of *bona fides*, and  
CORPORATION LTD. sec. 21 requires registration within 5 days from the execution  
v. thereof. In the present case none of these requirements was com-  
CAPITAL plied with. The registration of the conditional sale agreement  
DISCOUNT under the Conditional Sales Act, even if it could be construed as  
CORPORATION LTD. sufficient to satisfy the requirements of the Bills of Sale and  
Orde, J.A. Chattel Mortgage Act, which I doubt, could not overcome the want  
of the two affidavits.

Failure to register "the mortgage and affidavits" as required by the Act renders the mortgage absolutely null and void as against creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith for valuable consideration, under sec. 7.

Is that not precisely the position the plaintiff is in as against the defendant? The defendant has in good faith and for value acquired a title to the car. It is immaterial, in my judgment, whether the sale by Lind to the Robinsons was wholly or partly tainted with fraud or was or was not in the ordinary course of business. In the result Lind sold and assigned the car to the defendant, who took it subject to any rights the Robinsons may have had under their agreement to purchase. No question arises here as to the possible effect of any retention of possession by Lind after the sale to the Robinsons, because the defendant company ultimately got possession when it seized the car.

The learned trial Judge has treated the defendant's title as if it were derived from the Robinsons, and he holds that, as they were not purchasers in good faith from Lind, the defendant can have no better title as against the plaintiff than the Robinsons would have. I cannot agree with this view. The Robinsons acquired no title to the car whatever. It still remained in Lind, subject to their rights as conditional purchasers. Lind, for value, sold the car and the obligations of the Robinsons to pay for it to the defendant. Its rights are derived from Lind and not from the Robinsons at all, and it is of no consequence, in my opinion, that the bargain between Lind and the Robinsons may have been a fraudulent one. The defendant became, as a result of that transaction, a purchaser in good faith and for value within the meaning of sec. 7 of the Bills of Sale and Chattel Mortgage Act.

Counsel for the plaintiff directed a good deal of his argument

to combatting the theory that, because the bill of sale by Lind to the plaintiff (exhibit 2) had not complied with the requirements of sec. 8 of the Bills of Sale and Chattel Mortgage Act, it was void. In my opinion, this section has no bearing upon the question here at all. The so-called bill of sale (exhibit 2) was not intended to carry out a sale at all. It was, as I have said, executed to secure, or as one of the instruments intended to secure, a loan by the plaintiff to Lind. As such it was in substance intended to operate as a chattel mortgage, and sec. 8 has no application to it.

In my opinion, the plaintiff company, by reason of its failure to comply with the requirements of the Bills of Sale and Chattel Mortgage Act governing what was in reality a chattel mortgage upon the car, cannot as against the defendant rely upon its instruments of title. They are by sec. 7 null and void as against the defendant.

The appeal should be allowed and the action dismissed, both with costs.

LATCHFORD, C.J.:—I have had the advantage of considering the opinion of my brother Orde on the matters in question in this appeal, and agree in the conclusion therein arrived at.

The fictional transaction between the plaintiff and Lind was in fact nothing more than a method devised to secure by a mortgage on the car the loan made to Lind by the plaintiff. So regarded, as I think it must be, and whether the sale to the Robinsons was fraudulent or not—it was undoubtedly fraudulent on the part of Lind—the chattel mortgage cannot, owing to the statute, prevail against the defendant.

The appeal should, therefore, be allowed with costs and the action dismissed with costs.

RIDDELL, J.A.:—An action between two financial institutions, concerning the relative ownership of a certain automobile, the plaintiff having succeeded in the Court below.

One Lind was a dealer in automobiles in Hamilton, who, on the 4th April, 1929, bought from the Leggatt firm the car in question; of the price, \$1,349, he paid \$230, and a conditional sale agreement was taken as security for the balance, which was duly filed (exhibit 3). Lind went to the plaintiff and made a deal with it, whereby it was to pay the balance of the purchase-money to the Leggatt firm; he gave the plaintiff a promissory note for \$1,146, payable in three months; and, at the same time, the parties

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signed a "conditional sale agreement," purporting to evidence the sale by the plaintiff to Lind for \$1,349; Lind agreeing to hold it in trust for the plaintiff till full payment (exhibit 4). The plaintiff paid the Leggatt firm, and the car was delivered to Lind "to be disposed of in the usual way of business." This conditional sale agreement has no affidavit of *bona fides*."

The car remaining in the possession of Lind, on the 7th May Charles Robinson, who was Lind's general manager, and his wife purported to buy it; part of the alleged purchase-money was represented by a debt of Lind, and the balance was to be paid in monthly instalments; a "conditional sale agreement" was signed by Robinson in the name of himself and his wife (exhibit 7), and a promissory note given for the balance. Robinson protests that he knew nothing of the charge in favour of the plaintiff; but the learned County Court Judge does not believe him, nor do I: the whole transaction is redolent of fraud, and it is, I think, impossible to resist the conclusion that this Robinson deal was a wholly colourable and not a real one.

Lind took the note and the "conditional sale agreement" to the defendant; the agreement was filed forthwith.

On default by Robinson and Lind to pay, the defendant took possession of the car; and this action was brought, resulting, as has been said, in a judgment for the plaintiff: the defendant now appeals,

Unless our statute changes the legal position, it would seem that, the car being left with Lind by direction of the plaintiff for sale in the ordinary way of business, the Robinsons would have acquired title if the alleged sale to them were a real one and not fictitious. In that case the defendant, as assignee of the agreement given to Lind, would have a clear title to the car; but, in the event which actually happened, Lind was guilty of a plain breach of trust toward the plaintiff; and, if not protected by any statute, the parties would be remitted to their position as at the Common Law; Lind could not give title in this way to the defendant, and the defendant would take only what he could give them—consequently the plaintiff would be entitled to the car.

The proceedings by way of "conditional sale agreement," as in this case, is a very common one in business; and we should hesitate to change the usual business method of looking upon it; but we must not allow the maxim *Communis error facit jus* to override the plain words of the statute. After careful consideration, I am unable to take the plaintiff's document from the category of docu-

ments covered by our Bills of Sale and Chattel Mortgage Act, R.S.O. 1927, ch. 164. The plaintiff has not protected its title as it is required by that Act to do; and has no rights as against the defendant. The appeal should be allowed with costs here and below.

FISHER, J.A., agreed with ORDE, J.A.

*Appeal allowed.*

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[APPELLATE DIVISION.]

RE CLEGHORN.

*Will—Appointment of Executors and Trustees—Effect of Codicils—Original Appointment of Trust Company as Sole Executor and Trustee—Addition by Codicil of Individuals as Co-executors and Trustees—Delegation of Power of Appointment and Limitation of Time of Acting in Office.*

The testatrix by her will appointed a trust company her sole executor and trustee and devised and bequeathed to the company all her property upon certain trusts. Included in many devises and bequests to her three sons, her daughter-in-law, and several charities, were annuities for life to be paid to each of the sons and the daughter-in-law. The testatrix made and executed two codicils. In the first she alluded to the "perpetual life" of the trust company and said that she therefore had not named her sons as co-executors. The second codicil was headed "Second codicil appointing them as co-executors and trustees." By it the testatrix appointed two of her sons "to act as co-executors and trustees, i.e., two representative of my family during future life of said annuities to be periodically elected by said four in my will or their heirs entitled to the four chief annuities." Then followed these words: "Useful to charities is a trust company's continuous existence." She also made provision for the "election" or appointment by the annuitants of two of her sons and one other person as co-executor, empowering her "family in full control" to utilise "such third person" as "co-executor and trustee:"—"I appoint above three to act as three joint co-executors and trustees of my said will and codicil in place of the one executor and trustee company therein named." Two of the sons and a third person were, in the exercise of this power, formally appointed co-executors and trustees:—

*Held*, that, notwithstanding the use of the words "in place of," the intention was not to remove the trust company from the position of executor and trustee, but merely to appoint in substitution for it, as "the one executor and trustee," the three appointed persons to co-operate with the company during their lifetime in the joint administration of the estate.

Letters probate of the will and codicils should be granted to the company and the three persons selected, their term of office to continue "during future life of . . . annuities."

The power of appointing executors may lawfully be delegated as here, and the time during which they are to act may be limited either as to beginning or end.

*In Bonis Cringan* (1828), 1 Hagg. Ecc. 548, and *In Bonis Ryder* (1861), 2 Sw. & Tr. 127, followed.

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An appeal by the three sons of Clara Gardner Cleghorn, deceased, from an order of WIDDIFIELD, one of the Judges of the Surrogate Court of the County of York, directing the issue of letters probate of the will of the deceased and two codicils to the Trusts and Guarantee Company, the executor named in the will, to the exclusion of the appellants.

January 22. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*J. R. Roaf*, K.C., for the appellants, argued that by the second codicil the testatrix had revoked the appointment of the Trusts and Guarantee Company as executors of her will and trustees of her estate, and had provided that two of the family, together with a third person to be chosen by the family of the testatrix, as specified in the will, being three of her sons, and one Nell Gardner, the wife of John W. Gardner, should nominate and appoint two of the sons and a third person to be the executors and trustees, and that such election and choice was duly made. Reference to Williams on Executors, 11th ed., p. 165; *In Bonis Cringan* (1828), 1 Hagg. Ecc. 548; *In Bonis Ryder* (1861), 2 Sw. & Tr. 127; *Jackson and Gill v. Paulet* (1851), 2 Rob. Ecc. 344.

*E. G. Black*, for the Trusts and Guarantee Company, respondent, contended that the codicil, attempting to provide for the election of executors and trustees periodically, was a nullity because it was impossible to carry out its provisions, and so the original appointment of executors and trustees should stand. Having regard to the fact that the opening words of the second codicil stated that the testatrix was appointing executors and trustees so that the objects set forth in clause 20 of the first codicil should be carried out, it was obvious that she intended to have an executor and trustee who would be permanent, and so be able to discharge the trusts, which extended beyond the lives of her sons.

*A. T. Bowlby*, K.C., for the Salvation Army, *J. Nason*, for the Lord's Day Alliance, *H. J. Martin*, for the Toronto Humane Society, *J. G. Middleton*, for the Hospital for Sick Children, and *A. T. Hunter* and *W. E. Bastedo*, for the beneficiaries under the will.

February 6. LATCHFORD, C.J.:—This appeal is from the judgment of Judge Widdifield, in the Surrogate Court of the County of York, dated the 2nd October, 1930, in proceedings in solemn form to lead grant of probate of the last will and testament

with two codicils of the late Clara Gårdner Cleghorn. The judgment upheld the execution of the will and both codicils, and directed that probate should issue to the respondent the Trusts and Guarantee Company, as executor and trustee.

Three sons of the testatrix, her only children, appeal on the ground that by the second codicil two of them were indicated as her executors and trustees to the exclusion of the company appointed as such in the will itself.

The matter is not free from difficulty, owing to the indefinite and seemingly contradictory language employed in the second codicil. Two questions of major importance are involved: first, was there in the codicil a valid appointment, or provision for a valid appointment, of certain of the sons of the testatrix as her executors and trustees? and, secondly, if so, was that appointment or provision to the exclusion of the executor named in the will?

It is elementary law that a will and its codicils, when submitted to a court for interpretation, must be considered as an aggregate. The intention of a testator is to be gathered from the will as a whole, or, when there are codicils, from the collated instruments. So regarded, clauses which at first sight appear repugnant may be reconciled. When repugnancies seem to exist, it may be possible, as it is desirable, to reconcile them so as to give effect to the intention manifested by the testator.

By the will in question here, the testatrix appointed the Trusts and Guarantee Company to be her executor and trustee, and devised to the company all her property, real and personal, upon certain trusts which it is unnecessary to particularize. Included in the many devises and bequests to her three sons, the wife of her eldest son, and several charities, are four annuities, one to each of the sons "during his lifetime" and one to the daughter-in-law "during her lifetime." Provision is also made that should any of her unmarried sons marry and die leaving a wife or child or children, the share of the deceased is to be paid to the wife, or if no wife then to the child or children until such child or children attain the age of 21 years and not after. A discretion is given to the company to increase the annuities to the sons should the condition of the estate permit; and there is a disposition of the residue imposed on the executor and trustee.

It follows plainly that the testatrix intended that the complicated administration of her estate should extend over a long period—a period undoubtedly beyond the lifetime of her sons, and pos-

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App. Div.   sibly much longer. This idea of continuity is repeated in the  
1931.       first codicil, where these words appear:—  
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Latchford, named my sons as co-executors.”  
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I am clearly of opinion that this language of the will and first codicil must be had prominently in mind when the supposedly repugnant terms of the second codicil are under consideration.

An integral part of the second codicil, to which the attention of this Court was not called at bar, is the heading. I think it important, and marvel that it has been overlooked. It is in these words:—

“Second codicil appointing three as co-executors and trustees.”

Reading this in relation to the use by the testatrix of the word “co-executors” in the first codicil, the heading indicates that she intended by the codicil to appoint three persons to act conjointly with the executor and trustee endowed with “perpetual life.”

Does the codicil express such an intention? After much consideration, I incline to think it does.

The testatrix first manifests a desire for the economical conservation of her estate. Then the codicil proceeds: “I appoint two of my sons to act as co-executors and trustees, i.e., two representative of my family during future life of said annuities” (annuitants, her sons and daughter-in-law are meant) “to be periodically elected by said four in my will or their heirs entitled to the four chief annuities.”

Then follow these significant words: “Useful to charities is a trust company’s continuous existence.”

Charities, subject to the specific legacies and the annuities, are the chief objects of the testatrix’s bounty, and are entitled to whatever remains of the estate after the annuities expire.

If the words “I appoint two of my sons” were not supplemented as they are, they are too indefinite to warrant grant of probate to some two of the sons. “If a devise be to one of the sons J. S., who hath several sons, the devise is void:” *Strode v. Russell* (1708), 2 Vern. 621, 623. So also, “I appoint A. as my executor, with any two of my sons,” was held not to warrant grant of probate to two of the three sons of the testator in *In Bonis Baylis* (1862), 2 Sw. & Tr. 613. In *In Bonis Blackwell* (1877), 2 P.D. 72, where the testator directed that one of his sisters should be his sole executrix,

and he had three sisters living at the time, probate was refused to the one who had survived the testator.

However, in this case, Mrs. Cleghorn made provision for the "election" or appointment by the annuitants of two of her sons and one other person (not necessarily a son) as "co-executor."

Theobald, 8th ed., p. 100, states the law to be that a testator may (as in this case) delegate the power of appointing executors to another person, citing *In Bonis Cringan*, 1 Hagg. Ecc. 548, and *In Bonis Ryder*, 2 Sw. & Tr. 127, which fully support the proposition.

The members of her "family in full control" are empowered to utilise "such third person" as "co-executor and trustee." In the exercise of the power conferred by the codicil, two of the sons of the deceased, John M. Gardner and Percy N. Gardner, and William E. Bastedo have been formally appointed co-executors and trustees of the estate. As to these three the codicil proceeds: "I appoint above three to act as three joint co-executors and trustees of my said will and codicil in place of the one executor and trustee company therein named."

It is strongly argued by Mr. Roaf that the effect of the words "in place of" is to revoke the appointment of the company and exclude it wholly from the position of executor and trustee; but, having regard to the fact that administration of the estate was clearly intended to continue after the death of all the annuitants and the attainment of majority by any of their children, the recognition by the testatrix of the advantage presented by the "continuous existence" of a trust company—obviously in relation to the administration of the residuary estate—as "useful to charities," and the use of the words "co-executors" and "joint co-executors" (equivocal words it may be admitted, but for the intention of the testatrix clearly and frequently expressed in the will and both codicils), I have reached the conclusion that it is possible to reconcile with the will what is supposed to be an inconsistent clause in the codicil, and that Mrs. Cleghorn did not intend to remove the trust company from the position of executor and trustee, but merely to appoint in substitution for it, as "the one executor and trustee," the three appointed persons to co-operate with the company during their lifetime in the joint administration of her estate.

In the result, effect is given to the intention of the testatrix expressed in the will and codicils, considered as a whole.

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Accordingly, I think the appeal should be allowed in part and probate directed to issue to John M. Gardner, Percy N. Gardner, William E. Bastedo, and the Trusts and Guarantee Company Ltd., as executors and trustees. Costs of all parties in the appeal, as in the Court below, to be paid out of the estate; those of the trust company as between solicitor and client.

RIDDELL, J.A.:—"The lawyer's best friend, the person who makes his own will," again furnishes work for the Courts.

The testatrix, who is described as "a capable business woman with a strong mind of her own, who allowed no one to interfere with her wishes," executed a will prepared by a solicitor, on the 17th December, 1926. Later, being dissatisfied with it, she had her son typewrite some slips she had written, and cast them into the form of two codicils, which, as is found by the learned Surrogate Court Judge, she executed on the 10th June, 1929. In the original will, the Trusts and Guarantee Company was made sole executor; and, on her death, on the 6th December, 1929, the company applied for probate. The matter was adjudicated upon in solemn form; and, while the contention of the company that the codicils were forgeries was not sustained, probate was granted to the company, on the ground that the attempted change of executors, endeavoured to be made by the second codicil, was ineffective. Those claiming to be admitted as executors by reason of the provisions of the second codicil now appeal.

All difficulties as to the proper execution of the codicils being removed by the finding of the Surrogate Court Judge, which is not attacked, the sole matter in this appeal is the effect, if any, of the provisions in the second codicil as to executorship and trusteeship.

The will has the following clause: "I nominate and appoint the Trusts and Guarantee Company Limited, of the City of Toronto, to be the executors and trustees of this my will." The first codicil contemplates the continuation of the company in these capacities; it is expressly stated that "those acting as my executors and trustees whose life is perpetual will notice I have . . . not named my sons as executors;" and it is directed to "confer with my sons on matters of interest . . . to utilise my said heirs . . . to conserve and build up my estate in any and all ways. . ." Very specific and elaborate directions are given the company in this codicil as to the management of the property, etc., but no suggestion of its removal from the position given it by the will.

The second codicil, however, is wholly different in this respect. App. Div.  
The relevant portions of it read as follows:—

“To insure my private instructions set forth in 20 section  
codicil we the undersigned have just signed and executed, being  
carried out with the advantage to estate of personal attention from  
my sons, who understand it's details; sons who with me without  
salary built it from small inception; & is their daily calling or  
bread & butter; and so to their own interest to build up,—I  
appoint two of my sons, to act as co-executors and trustees i.e.  
two representatives of my family of 4 during future life of said  
annuities; to be periodically elected by said four in my will or  
their heirs, entitled to the four chief annuities. Useful to *chari-*  
*ties* is a trust company's continuous existence. My family in  
*full control* can utilise a third as co-executor & trustee, viz., any  
outside party having confidence of my family of 4; for happiness,  
to best build up my estate, and to inexpressively carry out my  
written wishes. Re expenses: my sons are to make careful written  
agreement with said 3rd party, giving 3rd party less than 1/3rd  
or as few duties as possible, prior to probate.

“I appoint above three to act as three joint co-executors &  
trustees of my said will and codicil in place of the one executor  
& trustee company therein named.”

“2. Re replacing old frame houses Nos. 25, 23 & 21 Kippendavie Ave.

“Should my sons or any two of them, have foresight, an alter-  
native plan is for my estate to buy the 30 x 40 brick building Nos.  
17 & 19 Kippendavie Ave. . . . And move said brick build-  
ing 60 ft. north on to Nos. 25 & 23 Kippendavie Ave. As this  
new 120 ft. fronting the Lake *east* of Kippendavie Ave. so made,  
would quickly double the estate in value. Possibly 4 buildings as  
on 120 ft. west of Kip Ave could later be built for revenue. Num-  
ber 21 Kippendavie Ave. would merge with said Nos. 19 & 17  
Kip. Ave to give the new 120 ft. along Kew Beach Ave. facing  
lake a depth say 56 feet; the son affected would in lieu get at least  
\$2200.00 from my estate, or share as per sec. 9 codicil. John,  
Percy and Arthur would alike each get both a \$400.00 annuity and  
building given them in sec. 6 Codicil. As also anything of Plans  
1 or 2 sec. 6 that my Executors & Trustees agree on as good—  
after buildings on 120 ft. Kew Beach Ave. are up and paid for,  
and preferably after title is bot to Nos. 17 & 19 Kip Ave; to  
energetically improve Kippendavie site, as future and funds  
permit.”

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"3. My family has power (a) to give Nos. 25 & 23 Kip Ave. wholly to charity that most helps built up my estate; also (b) to give but *one* lower floor sec. 6 Codicil to the S. Army till, the fourth building is up and paid for (by expropriation money).

"In all other respects I confirm both my said will and codicil thereto.

"5. Re litigation: My *family* are to *control* (funds, realty) as Ex. & Trustees; so if my Will or either Codicil is declared not legal or effective, or if litigation takes same to any court of appeal, then I revoke my said Will & Codicils & my Estate goes to my sons, not charity, to be dealt with as one dying intestate. Provided this is not a means mis-used by any of my own family to so set aside my Will & Codicils. 2."

Placing myself in the arm-chair of the testatrix, and endeavouring to find from the language employed by her precisely what she meant, and to give effect so far as possible to every word she has employed, the first point, as it seems to me, is to determine whether it is the clear intention that the company shall not act as executor.

It will be observed that the statement is made: "Useful to *charities* is a trust company's continuous existence;" and, as there are many charities to benefit by the will, it would seem at first sight that by this expression the testatrix indicated that she wished the continuance of the company in the position of executor and trustee to protect the charities. If there were no subsequent expressions inconsistent with this intention, I think we should so interpret her desires.

The terminology employed shews that when she appointed executors and trustees *simpliciter*, she says "executors and trustees"—see in the will as well as in the first codicil many times and uniformly—she does not use the terminology "co-executors and trustees" in such a connection. The expression "co-executor" is first employed in the first codicil in the following language: "Re Co-executor: Those acting as my executors & trustees whose life is perpetual will notice I have thus and therefor not named my sons as co-executors." This seems to me to indicate that she looked upon a "co-executor" as being some one added to these executors and intended to act along with them. She points out how the executors and trustees can have the advantage of the assistance of the sons or heirs, although they are not "co-executors." This is further indicated by the expression "the two co-

executors & trustees as above named by me," being the Salvation Army and the Sick Children's Hospital, which are "named by me to act as co-executor & trustee with my Trustees & executors to guard the future safety or integrity of" the \$85,000 capital given to them by a previous clause in the codicil. These three, i.e., the company, the Salvation Army, and the Sick Children's Hospital, are then "three executors & trustees" and are to act jointly or each in their advisory capacity; but, later in the codicil, a distinction is drawn between the "executors & trustees" and these two other bodies, the "executors & trustees" being directed to "confer with Salvation Army and Sick Children's Hospital" in matters affecting these two bodies.

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In another part of this codicil an earnest desire is expressed "that should those who are beneficiaries ever be of one mind and so express themselves in writing, then with the approval of and by the Surrogate Court, either the experience and skill of a second party, be appointed to act as co-executor and trustee, or a totally new executor & trustee be appointed . . ."

All this indicates that the testatrix used the terminology "co-executor and trustee" with the meaning, "some one to act with the executors and trustees already appointed," and sometimes, at least, to act only in matters in which the "co-executor & trustee" was interested.

Coming now to the second codicil, the language employed in the suggested substitution is, "I appoint two of my sons, to act as co-executors and trustees . . . during future life of said annuities." The appointment is not permanent but only during the life of certain annuities; there is no provision as to executors after the termination of the annuities; and it is fairly manifest that the interest of the annuitants was the main thing in view. The terminology is the same as that employed in the appointment of the Salvation Army and the Sick Children's Hospital in the first codicil; and, unless we are absolutely precluded from so holding, we should, I think, look upon this as intended to have the persons selected by the four act in conjunction with the executors and trustees already appointed.

I do not read the subsequent clauses as precluding this interpretation. The clause "I appoint above three to act as three co-executors & trustees of my said Will and Testament in place of the one executor & trustee company therein named" may well mean, and I think it does mean: "Heretofore, there has been one executor and trustee, the company; my will is that there shall no

App. Div. longer be but the one, but I shall add to them 'co-executors,' to  
1931. act conjointly with them so long as the annuities are alive."

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Riddell, J.A. executors & trustees" are in full control of the estate; it was the  
family, not two selected out of the family, who were in full control, so far as to be able without control from any source to  
"utilise a third as co-executor and trustee."

The provisions in para. 5 present some difficulty; but again  
"my family" who are to control the estate are not the two selected  
from the family with or without the outsider, who is to be taken  
in as a third "co-executor and trustee"—apparently what is meant  
is that the two are to outvote the one company executor and trustee. If we were to give effect to this clause as an appointment of  
executors and trustees, we must appoint the whole family, not the  
two selected.

On the whole I think we can best give effect to the real intention of the testatrix by holding that she intended to have the  
company as her executor and trustee, with the addition as co-  
executors of the two or three to be selected by the sons, these to  
have office only so long as the annuities had life. There is no  
difficulty in the way of the three persons who have been selected in  
the manner prescribed.

That executors may be found in such a manner is plain from  
such cases as *In Bonis Deichman* (1842), 3 Curt. 123; *In Bonis Cringan*, 1 Hagg. Ecc. 548; *In Bonis Ryder*, 2 Sw. & Tr. 127.  
And it seems equally clear that the time during which persons are  
to act as executors may be limited either as to beginning or as to  
end: Williams on Executors, 12th ed., p. 147, and cases cited.

At this time we need not consider any difficulty arising from  
the proposed periodic election of co-executors. From the law as  
laid down in Williams as above quoted, it would seem that there  
should be no difficulty in the matter, but that need not be considered on the present application.

I think the appeal should be allowed *pro tanto*, and it be declared that probate should be granted to the company and the  
three persons selected, their term of office to continue "during  
future life of . . . annuities."

All the trouble having been occasioned by the testatrix herself, the costs of all parties should be paid by the estate, those of  
the company and the three selected persons between solicitor and  
client.

ORDE, J.A.:—A contest which involves the mere question as to who shall act as trustee is often an unseemly one. Here there is some doubt as to the real intention of the testatrix. If a decision upon the point were vital, I should be inclined to Mr. Roaf's contention that the testatrix, notwithstanding her commendatory reference to trust companies, by the language of her codicil really appointed her sons as executors and trustees instead of the trust company previously appointed by her will.

But, having regard to the wide powers of the Court over the appointment of trustees, it seems to me that the simplest solution of the difficulty created by the ambiguity or uncertainty of the language of the testatrix is that proposed by my Lord the Chief Justice and my brother Riddell, and I concur in their judgments allowing the appeal *pro tanto* and in their disposition of the costs.

MASTEN and FISHER, J.J.A., also concurred.

*Appeal allowed in part.*

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[APPELLATE DIVISION.]

SHIESEL v. KIRSCH.

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*Company—Incorporated Brewing Company—Subsidiary Company Incorporated to Act as Sales-agent—Money Expended in Promoting Sales—Class-action by Shareholder to Compel Return to Company—Fraud not Alleged—Plaintiff a Party to Fraud Suggested upon Argument of Appeal—Sale of Intoxicating Liquors in United States—Division of Illegal Profits—Accounting—Agreement between Parties—Evidence—Failure to Shew Actionable Wrong.*

The judgment of GARROW, J. (1930), 66 O.L.R. 174, was affirmed, upon the grounds that the evidence did not disclose any actionable wrong done by the defendants; that fraud was not alleged in the plaintiff's pleadings; and that, while fraud was suggested upon the argument of this appeal, the plaintiff was himself a party to that which he suggested was fraudulent conduct on the part of the individual defendants.

The plaintiff and the individual defendants were all parties to an illegal scheme, the sale of intoxicating liquors in the United States; and the Court ought not to entertain any action between these parties concerning the division of their ill-gotten gains.

*Foster v. Driscoll*, [1929] 1 K.B. 470, applied.

And the plaintiff's attempt to enforce an accounting failed, because it was understood by all parties that the transactions in connection with the sale of liquor could never see the light of day, and each of the parties agreed to accept the word of the others as to the amount of money spent, without explanation or detail.

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AN appeal by the plaintiff from the judgment of GARROW, J. (1930), 66 O.L.R. 174.

November 13, 1930. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*J. H. Rodd*, K.C., for the appellant. To maintain an action against the directors of a company to compel them to pay back into the treasury of the company certain moneys alleged to have been improperly paid to them, it is not necessary for the shareholder suing to join the company as a plaintiff: *Henderson v. Strang* (1920), 60 Can. S.C.R. 201, 207; *Towers v. African Tug Co.*, [1904] 1 Ch. 558. The defendants controlled four-fifths of the stock in both companies. The appellant could not join these companies as plaintiffs in an action brought against the directors without obtaining the consent of these directors. The appellant knew that such consent would not be given, and he ought not to be prejudiced because it was not obtained. The appellant did not receive a portion of the money which he alleges was improperly paid to the directors of the St. Clair Company, and therefore he is entitled to maintain an action against the defendants to compel them to pay back such money to the company. This is not a question of internal management. Reference to *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350; *Theatre Amusement Co. v. Stone* (1914), 50 Can. S.C.R. 32, 36; *Simpson v. Westminster Palace Hotel Co.* (1860), 8 H.L.C. 712.

*G. L. Fraser* for the defendants, respondents. Where a suit is necessary to obtain from the directors of a company an account of their dealings with the company, or to recover from them property or money of the corporation, the only proper plaintiff is the company itself: *McMurray v. Northern Railway Co. and Cumberland* (1875), 22 Gr. 476; *Atwool v. Merryweather* (1868), 37 L.J. Ch. 35. If there was an improper user of the company's money, the appellant cannot complain, as he participated in it. A majority of the directors may do anything within the powers of the company except commit a fraud: *Burland v. Earle*, [1902] A.C. 83; *Dominion Cotton Mills Co. Ltd. v. Amyot*, [1912] A.C. 546. There is no evidence of any fraud having been committed by the directors in the present case. In the absence of conduct amounting to fraud, the Court has no right or duty of interference: *Fulleton v. Crawford* (1919), 59 Can. S.C.R. 314, 340; *Purdom v. Ontario Loan and Debenture Co.* (1892), 22 O.R. 597.

February 9, 1931. MULOCK, C.J.O.:—This is an appeal from the judgment of Garrow, J., dismissing the action. The circumstances out of which it arises are as follows:—

The Riverside Brewing Company, a company carrying on a brewery business at Riverside, a point in Ontario on the Detroit river, entered into a written contract dated the 19th January, 1927, with a company called the St. Clair Company, whereby the latter company was appointed sole agent of the brewery company for the sale of its beer product for a term of years, and for its services as such agent was to be remunerated at the rate in the said contract set forth. The St. Clair Company for such services earned and was paid a considerable sum of money, and the sole matter in issue here is whether any of its earnings have been fraudulently disposed of.

In the unamended statement of claim the plaintiff alleges that "large profits were earned and distributed by the defendant the St. Clair Company in 1927 and 1928; the amount of earnings, if any, for the year 1929, are unknown to the plaintiff.

"The plaintiff received out of the said profits only \$2,500 in 1927 and nothing in 1928 or 1929, and the balance was improperly paid by the said company to the defendants Fred J. Kirsch, William Theiry, Fred W. Hanson, and Roy Pascuzzi."

And the substance of the prayer is that the defendants be ordered "to pay back into the treasury of either or both of said companies the sum of \$105,500 improperly paid to them by the said company."

At the trial the following amendments to the statement of claim were allowed:—

"On the 19th day of January, 1927, the defendant the Riverside Brewing Company entered into a contract with the St. Clair Company appointing the latter its only sales and forwarding agent for five years, for the consideration and on the terms and conditions therein mentioned.

"The said contract was approved by the directors of the Riverside Brewing Company in an improper and illegal manner and was not disclosed to nor approved or ratified by the shareholders of the said company.

"The plaintiff alleges that the defendants Fred J. Kirsch, William Theiry, Fred W. Hanson, and Roy Pascuzzi, as directors and officers of both the defendant companies, illegally organised the defendant the St. Clair Company and procured and made the said contract for their own gain and profit and in breach of their

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duty as trustees to the shareholders of the Riverside Brewing Company.

“The said Fred J. Kirsch, William Theiry, Fred W. Hanson, and Roy Pascuzzi obtained and received large profits and remuneration by reason of the said contract.”

To entitle a shareholder on behalf of himself and others to maintain an action to redress a wrong to the company, or to recover moneys alleged to be due it, the plaintiff must allege and prove that the acts complained of are of a fraudulent character or beyond the powers of the company: *Dominion Cotton Mills Co. Ltd. v. Amyot*, [1912] A.C. 546.

The unamended statement of claim does not complain of any *ultra vires* act, and the only allegation of wrongdoing is that the personal defendants “improperly” paid certain moneys to themselves. An improper payment is not necessarily a fraudulent one, and before the abolition of demurrers the statement of claim would have been demurrable. However, when the case came before the trial Judge, in the exercise of his discretion he allowed the amendment above set forth.

The most unfavourable interpretation as against the personal defendants which can be given to the amendments is that, for personal reasons and in disregard of the interest of the brewing company, the defendants procured the making of the contract in question and by reason of the contract made large profits. An improper motive in the procuring and making of a contract is not in itself an actionable wrong; and the allegation here that large profits were paid to the defendants by reason of the contract does not necessarily imply any actionable wrong to the company.

Irrespective of the contract, the defendants may have been entitled to all the moneys received.

For these reasons, I am of opinion that the learned trial Judge was entitled to have dismissed the action because the pleadings did not disclose a cause of action. Since, however, the plaintiff was allowed the opportunity of shewing by evidence wherein, if at all, the personal defendants had done any wrong to the company, or through it to the plaintiff and other shareholders, I shall now proceed to consider what, if any, case has been established against the defendants.

No case was made against the validity of the contract, and therefore it must stand. Thus it follows that all the earnings of the St. Clair Company under the contract belong wholly to that

company, and the plaintiff's only status for his claim to share in them is *quâ* shareholder in that company.

He attacks two classes of payments made by the St. Clair Company to the defendants, namely, payments made to them (a) for their services as officers, and (b) for expenses in the performance of such services.

As to the first class, the plaintiff contends that the defendants, being directors, were not entitled to be paid as officers of the company. Before their appointment as officers, the shareholders passed a by-law in these words: "A director of the company may fill any position in connection with its management and the administration of its affairs to which he may be appointed by his fellow-directors. The directors shall have the right by majority vote to fix their remuneration either as directors or as officers of the company, and also salaries or remuneration to be paid to all salaried officers of the company, and to vary the same when it may be expedient to do so."

So authorised, the Board appointed the defendants as officers to promote the business of the brewing company, namely, the sale of beer. The evidence shews that, with the approval of the board, for the purpose of promoting the sale of the beer in question, they travelled extensively through the United States and elsewhere, and in that connection incurred large personal expenses. The payments made to them as officers were according to the terms of their engagements, and no exception can be taken to them.

With reference to the payments to them for expenses, the complaint is that the defendants did not render detailed or itemised accounts of their expenses. I do not think that they were expected to do so; the nature of their services rendered it almost impossible for them to give a detailed account of expenses. It was supposed by the company and the defendants that the company could not lawfully advertise the sale of beer; and therefore to make its merits known and to develop a demand for it, it was necessary for the defendants to visit different towns; their duties took them to hotels and other places where liquor might be expected to be sold, and where by treating and other more or less questionable methods sales might be effected. For two or three years these men travelled in the interest of the company and were paid monthly or at other brief intervals for their travelling expenses. The practice was for them to report to the secretary-treasurer from time to time the bulk amount of their expenses, whereupon that officer would make further advances to them

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wherewith to meet future expenses. Such was the regular method of accounting. It may have been unbusiness-like, but does not justify the charge of fraud against the company in respect of the moneys paid over to them. There is no evidence that the moneys in question were not honestly expended in the interest of the company, and in the absence of such evidence it was competent for the board or a majority of the shareholders to ratify the payments of the moneys in question to the defendants, and the Court would have no jurisdiction to interfere in what is a matter of internal management of the company's affairs.

For the foregoing reasons, I am of opinion that the evidence does not disclose any actionable wrong by the defendants, and therefore the appeal should be dismissed.

I agree with the trial Judge that the plaintiff, who was a director of the St. Clair Company, acquiesced in the matters now complained of and knowingly benefited from the operations of the company, and therefore cannot be heard to complain: *Henderson v. Strang*, 50 Can. S.C.R. 201.

MAGEE, J.A., agreed with the Chief Justice.

MIDDLETON, J.A.:—I agree with my Lord that this appeal must be dismissed.

The action is an exceedingly curious one in regard to the attending circumstances, and the pleadings are in exceedingly unsatisfactory condition.

The plaintiff sues on his own behalf and on behalf of all other shareholders of two companies, the Riverside Brewing Company Limited and the St. Clair Company Limited, making the directors of these two companies parties defendant as well as the companies themselves. I doubt the propriety of an action constituted this way. That which is alleged as wrongdoing on the part of the directors of one company is quite different from and independent of the wrong alleged to have been done by the directors of the other company. As in my view the action entirely fails, it is not necessary to pursue this inquiry further.

In the pleadings there is no specific allegation of fraud, but upon the argument that which is lacking in the pleadings is abundantly supplied by the statements of counsel. I think it is of importance that where fraud is intended to be alleged it should be specifically charged in the pleadings. The main difficulty in the plaintiff's way is that he was himself a party to that which he now suggests was fraudulent.

The Riverside Brewing Company was incorporated under the laws of the Dominion on the 15th April, 1924, to carry on the business of brewers and maltsters, exporters, distributors, and dealers generally in ales, beers, porters, and similar articles, the operations of the company to be carried on throughout the Dominion of Canada "and elsewhere." The company did not go into operation until after obtaining supplementary letters patent on the 1st May, 1926. By these letters the authorised capital of the company was increased.

The defendant brewing company was established at Windsor, and the intention, while manufacturing in Canada, was to sell beer "elsewhere," to wit, in the United States of America. It was realised that, owing to the prohibition law in force in the United States and to the action of the Dominion in aiding the United States in their enforcement of its law, to ship liquor direct into the United States would be highly dangerous. It was therefore deemed expedient to incorporate a subsidiary company for the purpose of conducting this branch of the business; and, accordingly, the St. Clair Company Limited was incorporated under the Dominion law, the incorporators being the directors of the Riverside Brewing Company, for the purpose of acting as manufacturer's agents, salesmen, sale representatives for the goods and products of any company, including wares, merchandise, wines, liquors, and all beverages intoxicating or non-intoxicating, with the right to buy, sell, and deal in such goods, wares and merchandise, the operations of the company to be carried on throughout the Dominion of Canada "and elsewhere."

An agreement bearing date the 19th January, 1927, forms the vital nexus between these two companies. The Riverside Brewing Company appoints the St. Clair Company its sole sales and forwarding agent for five years to handle the products of the brewery for export and domestic distribution, delivery being made at the docks of the St. Clair Company at Windsor. The price at which the liquor is to be sold by the brewery is specified and the export company agrees to collect this and to account for it.

It is disclosed that the selling price to be paid to the brewery is practically the cost of manufacture, and that the difference between the retail price and the cost would be far in excess of an ordinary agent's commission. This is accounted for by the fact that this beer had to be "introduced" into the United States, and there was much difficulty and expense in securing a market for it

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in that country, owing to the stringency of its law and the rigour of the enforcement of that law.

The situation is very similar to that which arose in *Foster v. Driscoll*, [1929] 1 K.B. 470, where Lord Justice Lawrence, discussing the documents there in question, said (p. 500) :—

These are “documents drawn up for the purpose of dressing up in a legal garb such of the terms of an illegal joint adventure as the parties deemed it prudent to record in writing.”

A large quantity of liquor found its way into the United States through the operation of the St. Clair Company and its officers. Certain of the directors of this company spent much time and much money in forwarding the sale of liquor in the United States. It is not deemed prudent or practicable to record that which was spent or how it was spent. The brewing company, as already stated, practically made nothing, as everything over and above the actual cost of manufacture went to the selling agent, the St. Clair Company. The directors of this company were the sole shareholders. None of them paid in any money whatever. The plaintiff, a director of both companies, shareholder in both, was a party to this agreement, but he apparently took no active part in the selling. The active agents in forwarding the sales were the individual defendants. They received salaries for the services they rendered. They received a refund of the moneys that they spent. Their word as to the amount spent was accepted. No particulars were given. The surplus was then divided among all the shareholders, including the plaintiff, and he has received in respect of the \$500 stock subscribed for by him, and for which he paid nothing, in three years dividends amounting to over \$3,000. The others, in addition to their salaries, because they had much larger stock holdings, received very much more money. The plaintiff is dissatisfied and brings this action.

So far as he seeks relief as a shareholder of the brewing company he charges that in the making of the agreement the interests of the brewing company were ignored, and the whole thing was a scheme to turn the entire profit into the exporting company, so that it might be divided between himself and the individual defendants, and this his counsel says was a fraud. There may be ample foundation for this, but on the most elementary principles he cannot allege fraud to which he was a party. Beyond this there is no reason why the brewing company itself should not assert its own rights, for it has many shareholders who have paid actual money for their shares. It is not alleged or shewn that it is dominated

or controlled in any improper way, if at all, by the individual defendants.

In so far as the plaintiff seeks redress as a shareholder of the St. Clair Company, it may be that he has technically made a case bringing himself within the principle of *Burland v. Earle*, [1902] A.C. 83, but this, I think, is not sufficient. The plaintiff and the individual defendants were, I think, all parties to an illegal scheme, the sale of liquor in the United States. The case falls within the principle of *Foster v. Driscoll*, and our Courts ought not to entertain any action between these parties concerning the division of their ill-gotten gains. I quote familiar words from Pothier on Obligations, vol. 2, p. 1:—

“The English Courts of law and equity will, in every case attended with those circumstances, decide according to the great principles of universal justice . . . Wherever an engagement is entered into with a view to contravening the general policy of the law, no form of expression can remove the substantial defect inherent in the nature of the transaction; the law will investigate the real object of the contracting parties, and if that is repugnant to the principles established for the general benefit of society, it will vitiate the most regular instrument which ingenuity can contrive.”

I would also reiterate the great words of Lord Chief Justice Wilmot in *Collins v. Blantern* (1767), 1 Sm. L.C., 13th ed., 406, at pp. 410, 411:—

“The manner of the transaction was to gild over and conceal the truth; and wherever the courts of law see such attempts made to conceal wicked deeds, they will brush away the cobweb varnish, and shew the transactions in their true light . . . All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”

This ought to be as true to-day as when written so many years ago.

Upon another ground I think that any attempt to enforce an accounting fails. It must have been known and understood by all these parties that the transactions in connection with the sale of this liquor could never see the light of day, and each of these parties agreed to accept the word of the others as to the amount of money spent, without explanation or detail being revealed. To allow this plaintiff to demand and receive money because his co-conspirators cannot or will not disclose the names of the persons

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 1931. honour among thieves."

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HODGINS and GRANT, J.J.A., agreed with MIDDLETON, J.A.

*Appeal dismissed with costs.*

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*Criminal Law—Manslaughter—Conviction—Appeal—Absence of Evidence that Prisoner Struck Blow which Resulted in Death—Gang Warfare—Common Purpose—Criminal Code, sec. 69 (2)—Judge's Charge—Misdirection and Nondirection—New Trial—Substantial Miscarriage of Justice.*

The prisoner, convicted of manslaughter, appealed from his conviction as being contrary to law, and also asked for leave to appeal on the facts. E., the person killed, a lad of 16, was standing with five other young men in a park, when the accused, staggering as if drunk, and accompanied by a girl, passed them, but soon turned around and came back to them, and a general fight occurred. There was a conflict of evidence as to what was said or done before the fight began. It appeared, however, that the prisoner shouted for his "gang" and that about 15 or 20 men came running up. There was no evidence that the accused struck the blow which caused the death of E., but the evidence shewed that his death was caused by a blow which crushed the chest and bruised the heart:—

*Held*, by the majority of the Court, that to render the accused criminally responsible for the blow, the onus was upon the Crown to establish that the essential conditions set out in sec. 69 (2) of the Criminal Code were fulfilled, viz., that the prisoner and other persons, one of whom had struck the blow, had "formed a common intention to prosecute an unlawful purpose, and to assist each other therein," and if an offence were committed by one of them in the prosecution of such common purpose, and the commission of such offence was, or ought to have been known to be, a probable consequence of the prosecution of such common purpose, the prisoner might be found guilty as if he had struck the blow; and, as there was no evidence of any arrangement entered into before the actual fracas, and the forming of the common intention (if any was formed) must be inferred from the circumstances, it was of vital importance that the jury should be carefully instructed in that regard and also as to knowledge of the probable consequence of the prosecution of the common purpose.

And *held*, that the trial Judge's charge to the jury in respect of these matters was insufficient.

The Judge erred also in telling the jury that it was immaterial whether there were or were not two gangs engaged in the fight—the prisoner was not responsible for the acts of any gang except the one he had called for.

Again, there being some evidence in support of the defence that the attack upon E. was in self-defence, the Judge erred in telling the jury that it was not urged as a defence, and that the defence was

provocation, and in telling the jury that a written statement made by the prisoner to the police disposed of every defence except provocation.

And for these various reasons the conviction was set aside and a new trial directed (HODGINS, J.A., dissenting).

*Per* HODGINS, J.A.:—Under our system of law the Judge's charge to the jury, generally an intelligent body, should not be scrutinised with such a degree of care as to magnify the slightest slip or omission. There must be something substantial or clearly material before a new trial will be granted for such a reason. Taking the objections *seriatim*, none of them (even if established) could be regarded as indicating a substantial miscarriage of justice within sec. 1014 of the Criminal Code; and such objection, raised for the first time in the court of appeal, should not be given effect.

AN appeal by the defendant from his conviction for manslaughter, upon trial before LOGIE, J., and a jury, at the Toronto assizes, upon the ground that the conviction was contrary to law: and also a motion for leave to appeal on questions of fact.

January 14 and 15. The appeal and motion were heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*Vera L. Parsons*, for the appellant. His failure to testify was made the subject of comment by counsel for the Crown. In the course of his address to the jury, counsel for the Crown made the remark that a certain statement made by the accused to one of the witnesses prior to the trial "is not sworn to." This is not a direct comment on the fact that the accused did not testify, but it is a damaging insinuation which entitles the accused to a new trial: *Regina v. Corby* (1898), 1 Can. Crim. Cas. 457, 464; *Regina v. Coleman* (1898), 30 O.R. 93, 2 Can. Crim. Cas. 523, 532; *Rex v. Hill* (1903), 7 Can. Crim. Cas. 38, 41; *Rex v. King* (1905), 9 Can. Crim. Cas. 426, 437, 440; *Rex v. McGuire* (1904), 9 Can. Crim. Cas. 554, 557; *Rex v. DeMarco* (1906), 17 Can. Crim. Cas. 497, 503; *Rex v. Gallagher* (1922), 37 Can. Crim. Cas. 83, 84, 85; *Rex v. Portigal* (1923), 40 Can. Crim. Cas. 63, 66; Canada Evidence Act. R.S.C. 1927, ch. 59, sec. 4(5). The verdict is unreasonable, as there was no evidence to shew that the accused struck the blow which caused the death: *Rex v. Bennett* (1912), 8 Cr. App. R. 10, 11; *Rex v. Armstrong* (1922), 16 Cr. App. R. 147, 148; *Rex v. Demetrio* (1926), 59 O.L.R. 249, 251; *Regina v. Luck* (1862), 3 F. & F. 483, 491; *Regina v. Skeet* (1866), 4 F. & F. 931, 933, 936, 937; *Rex v. Collison* (1831), 4 C. & P. 565, 566; *Regina v. Curtley* (1868), 27 U.C.R. 613, 617; Foster's Crown Law, p. 353; Taschereau's Criminal Code, p. 33. The evidence of William Black was inadmissible, as it was evidence of bad character: *Regina v.*

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App. Div. *Rowton* (1865), L. & C. 520, 540; *Rex v. Long* (1902), 5 Can. 1931. Crim. Cas. 493, 498; *Regina v. Bent* (1886), 10 O.R. 557, 560; *Rex v. Fisher* (1909), 3 Cr. App. R. 176, 179, 180; *Rex v. Ellis* (1910), 5 Cr. App. R. 41, 42, 61, 62; *Regina v. Gibson* (1887), 18 Q.B.D. 537, 542, 543; *Allen v. The King* (1911), 44 Can. S.C.R. 331; *Rex v. Rodley* (1913), 9 Cr. App. R. 69, 73, 76; *Rex v. Miller* (1926), 19 Cr. App. R. 84. The trial Judge put the effect of certain evidence wrongly to the jury. This is misdirection sufficient to cause the conviction to be quashed. He also failed to explain to the jury that the credibility of a material witness was for them to decide: *Rex v. Sovosky* (1908), 1 Cr. App. R. 98, 99; *Rex v. Mason* (1909), 2 Cr. App. R. 59, 61; *Rex v. Manheim* (1926), 30 O.W.N. 317; *Rex v. Ellsom* (1911), 7 Cr. App. R. 4, 12; *Rex v. Corrigan* (1912), 8 Cr. App. R. 4, 6, 7; *Rex v. Rodda* (1919), 5 Cr. App. R. 85, 90. The trial Judge misdirected the jury when he stated that every defence except provocation had been disposed of and that provocation was not a good defence to this action. The chief ground relied upon by the accused was self-defence, and this had not been disposed of and was not properly put before the jury: *Rex v. Hewston and Goddard* (1930), 38 O.W.N. 49, 50; *Rex v. Dinnick* (1909), 3 Cr. App. R. 77, 79; *Rex v. Hill* (1911), 7 Cr. App. R. 26, 28; *Rex v. Graves* (1912), 20 Can. Crim. Cas. 384, 386; *Rex v. Deana* (1909), 2 Cr. App. R. 75, 76; *Rex v. Humphreys* (1919), 14 Cr. App. R. 85; *Brooks v. The King*, [1927] S.C.R. 633. The accused has been found guilty of a constructive crime, not a personal crime, and therefore the sentence is excessive. Reference to sec. 1057 of the Criminal Code.

*A. W. Rogers*, for the Crown. The probable consequences of any breach of the peace, especially where a crowd is involved, includes everything up to and including killing, a common intention to commit an offence, such as in this case a breach of the peace, is all that is necessary to render all participants liable for the probable consequences: *Regina v. Caton* (1874), 12 Cox C.C. 624, *per* Lush, J., at p. 625; *Rex v. Murphy* (1833), 6 C. & P. 103; *Regina v. Harrington* (1851), 5 Cox C.C. 231. It has been suggested that the specific question whether there was a common intention to commit a breach of the peace, or whether it was merely a summons to the aid of a friend who was being assaulted, was not submitted to the jury. But the learned trial Judge repeatedly told the jury that they were the judges of the facts. There was no failure on the part of the Judge to put the defence of the accused fairly before the jury. He does say that provocation was the de-

fence raised, but he also deals fully at a later stage of his charge with the question of self-defence and also with the defence of drunkenness which he thought had not been raised. Self-defence may be a defence to a person assaulted, but it is no defence to a group where the action of the group was not in self-defence but aggressive. Any self-defence ceased when the attack by the gang commenced. Where self-defence is raised there is a very definite onus on the accused to prove the facts amounting to self-defence and that the method employed was reasonable: *Picariello v. The King* (1923), 39 Can. Crim. Cas. 229. There is not the slightest suggestion of any evidence that would permit the accused availing himself of secs. 53 and 54 of the Code, because there is no evidence that the boy who was killed made any assault upon the accused: *Regina v. Salmon* (1880), 14 Cox C.C. 494. No substantial defence was overlooked by the trial Judge. There has been no miscarriage of justice. It has been said that a fair test of the propriety of the charge is that no objection is raised to it at the trial: *Rex v. Hill* (1928), 61 O.L.R. 645; *Rex v. Melyniuk and Humeniuk* (1930), 53 Can. Crim. Cas. 296.

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February 9. The judgment of the majority of the Court was read by MULOCK, C.J.O.:—The accused was convicted of manslaughter, and appeals from such conviction as being contrary to law and asks for leave to appeal on the ground that it is not warranted by the evidence.

On the 9th May, 1930, Walter James Elson, a lad aged 16 years, met his death under the following circumstances. On the evening of the 9th May, 1930, the deceased and five other young men were standing alongside of a fence which ran along Riverdale Park, when the accused, staggering as if under the influence of liquor, accompanied by a girl, passed them. When some 20 feet away, the accused turned around and came back to where the young men were standing, and a general fight occurred. There is a conflict of evidence as to what was said or done before the commencement of the fight.

For the Crown, the evidence was to the effect that the accused asked the young men "if we were looking for a fight;" that two or three of the young men answered saying, "We don't want a fight;" and that the deceased did not utter a word; that the accused replied saying, "I will give you a fight," and then "hollered," "Oh! Fat," whereupon a "big fellow" came running up, and the accused told him "to go and get Porky and the gang," whereupon the "big

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fellow" ran up the hill and in about a minute returned with a "bunch" numbering some 15 or 20, and coming from different directions, whereupon the accused hit the deceased in the face with his fist. The deceased put his hands to his face, bent over and appeared to fall on the ground, and members of the "gang" assaulted some of the young men.

The evidence for the defence was to the effect that when the accused, with the girl, was passing the group of boys, some or one of them made a "dirty remark;" that when the accused was some few feet away he endeavoured to return to where the boys were standing; that she held on to him for a while, and the boys started yelling "let him go, let him come back," whereupon the accused broke away from her and returned to where the boys were; that five or six of the boys attacked the accused, who was trying to defend himself.

Shortly before the fight there had been a base-ball match in the vicinity, and the suggestion of the defence was that some of the men who appeared after the accused had "hollered" for the gang were not members of the "gang" but persons who had been attending the base-ball match.

A general fight appears to have taken place, and on its conclusion the parties dispersed, leaving the deceased lying upon the ground. A few minutes afterwards he was put into an automobile to be removed to the hospital, but died before arriving there. Dr. Robinson performed the *post mortem* and gave it as his opinion that the death "was due to a crushing anterior of the chest, or rather a sudden crushing anterior of the chest producing a bruising of the heart and lungs, and particularly, I imagine, it was the effect of this bruising of the heart." Asked how that crushing might have been caused, Dr. Robinson said: "I think it has been produced by some heavy object suddenly applied on the chest, a blunt instrument, because there were no marks on the front of the chest to indicate that a small, sharp-angled instrument or anything like that had been used. It was rather a heavy blunt object suddenly applied to the chest, and I think the force has been more particularly on the left side. I might say that in this individual, 16 years of age, the ribs are fairly pliable, and the cartilages which join the bony part to the chest wall are still pliable, and it is fairly easy to produce a crushing of the chest without fracturing any of the ribs. . . . There were no bones fractured."

It was conceded by the Crown, and correctly stated by the learned trial Judge, that there was no evidence that the accused

had struck the blow which resulted in the death. In order, therefore, to render the prisoner criminally responsible for that blow, the onus was upon the Crown to establish to the satisfaction of the jury that the essential conditions set out in the Criminal Code, sec. 69(2), were fulfilled: i.e., that the accused and the other person or persons by whom the blow was struck had "formed a common intention to prosecute an unlawful purpose, and to assist each other therein," and that if an offence were committed by one of them *in the prosecution of such common purpose, and the commission of such offence was, or ought to have been known to be, a probable consequence of the prosecution of such common purpose*, then and in such case the accused might be found guilty as if he had struck the blow. Where, as in this case, there was no evidence of there having been any arrangement entered into at a time prior to the actual fracas, and the forming of the "common intention" (if any was formed) must therefore be inferred from the circumstances, it is of vital importance that the jury be very carefully instructed in that regard. So, also, as to the equally essential factor, namely, that "the commission of the offence (manslaughter) was or ought to have been known to be a probable consequence of the prosecution of such common purpose."

In this connection also, as the evidence as to the identity of those persons who came up and joined in the *melée* was of a very hazy and indefinite character, only one of them, "Porky" Thompson, being identified as having been one of the associates of the accused, and he not the one whom the accused was said to have called to come, and as the evidence given by the Crown witnesses was quite positive that the persons who came were seen approaching from at least three different directions, and the fatal blow may have been struck by one who was not an associate of the accused, and may even have been unknown to him in so far as is disclosed by the evidence, it was essential that the jury should have been made to understand clearly what was involved, in this aspect, in their finding a verdict of guilt.

With great respect, I am of opinion that the charge to the jury in respect of these matters was insufficient.

For other reasons also I think the conviction must be set aside.

From the learned Judge's charge to the jury, it would seem that counsel for the defence in her address to the jury had suggested that not only the gang of the accused but also another gang took part in the fight which resulted in Elson's death, but the learned Judge told the jury that it was immaterial whether there

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were or were not two gangs. I cannot agree with that view. The accused was not responsible for the acts of any gang except the one which he had called for. Further, I think the learned Judge erred in respect of the defence of self-defence. Price, a witness for the defence, swore that he was in the vicinity of the place where the fight was going on; that the girl came to him, and in consequence of what she told him he went down towards the fence and there saw five or six young men attacking the accused; that the latter was endeavouring to defend himself; and that he (Price) attacked one of these assailants; but, so far as appears, Price's intervention was unsolicited by the accused, and he swore that he was not a member of the accused's gang.

Counsel for the defence informed us that in her address to the jury she had strongly contended that throughout the fight the accused was acting solely in self-defence. It would seem, however, that the learned trial Judge did not fully realise that self-defence was one of the defences which the accused was entitled to have pronounced upon by the jury; for, although in his charge to the jury the learned Judge several times discussed the evidence in respect of that defence, nevertheless he told the jury that counsel for the accused had not urged it as a defence, and that, so far as he could make out from the evidence, the defence was that of provocation, and he also told the jury that the written statement of the accused, made to the police, "disposed of every defence except that of provocation." There was evidence in support of the defence of self-defence, and the accused was entitled to have that defence laid clearly before the jury to be passed upon by them. This was not done.

For these various reasons I am of opinion that the conviction should be set aside and a new trial had.

HODGINS, J.A. (dissenting):—This is an appeal on certain points of law from a conviction for manslaughter and also an application for leave to appeal on questions of fact. The conviction arises from the consequences of a collision between two groups of young men in Riverdale Park, Toronto, on the evening of the 9th May, 1930, shortly after 9 o'clock, as a result of which one of them, Walter Elson, a youth of 16 years, was killed. He was found by one Pepper, lying on the ground unconscious, and was taken to No. 4 police station. When discovered he was lying upon a cinder path in the park where the fight took place, shewn in the photographs produced, gasping for breath, with his face resting on

the cinders. From No. 4 police station he was taken to St. Michael's hospital, but died on the way.

Dr. Robinson, who performed an autopsy, pronounced the cause of death to be a heavy blow or stroke on the chest, and the crushing of the heart and lungs thereby, which he said might have been caused by a heavy, blunt object suddenly applied to the chest. He admitted on cross-examination that an arm or a knee or the heel of a foot would have caused the death.

The deceased exhibited on his face bruises or scratches which were filled with the dust which comes from a cinder path, black, gritty dirt.

The facts of the case, proved on behalf of the Crown by the evidence of three members of the group of six, were as follows: Six young men were, at the material time, standing along a fence in Riverdale Park on the west side of the Don river. Their names were Alex. Williamson, 21 years old, his step-nephew John Williamson, 18 years old, Roland Doré, about 16 years of age, Harry Monet, Donald Archer, and Walter Elson. They played football until about 9 o'clock, and were standing between the pavilion and the railway crossing. Alex. Williamson was at one end and Elson was nearer the other end, but standing out a few feet from the fence against which the rest were lounging. While there, Silverstone, the appellant, passed this group, having with him a girl who was holding him by the arm; he was staggering about "all over the path." After he had passed about 20 feet—or as he passed—some laughter broke out among the group, and he turned to go back, while the girl sought to persuade him to go on, and kept her hold on him for that purpose. Silverstone, however, broke away from her and approached the group, and Elson, being a little out from the fence, was spoken to by Silverstone asking him if they wanted to fight, to which the reply was made, "Nobody wants a fight here." Silverstone then said they would have a fight whether they wanted it or not and hit Elson under the chin. This was evidently the beginning of the fight.

Alex. Williamson, John Williamson, and Doré all testify to these circumstances in detail; the only difference that I can see is that Doré, on cross-examination, says that the laughter might have been while Silverstone was passing and not after he had gone 20 feet or thereabouts past them. All deny the making of the foul remark written down by the girl Lozer when she gave her evidence, or that any was made, and all gave the number of the attacking

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party as 10 to 15 or more. The individual experiences then follow.

Alex. Williamson says that, before Silverstone struck Elson, he said to him "Don't move" and "hollered" to a man called "Fat" "to bring the gang." "Fat" is a man named Burleigh, and Detective Black describes him as being or having been a professional boxer. Williamson further says that, after the call to "Fat," some 15 or 20 young men came from three different directions—from the railway track, from the drinking pool at the pavilion, and from across the track. He himself had just turned his head, looking at Elson, and when he turned it back he says he was struck by Frank Thompson, whom he describes as one of the gang, known as "Porky," and hit right on the mouth, and as he fell some one kicked him on the head and he remembers no more. He saw Thompson, but did not see who kicked him, having put up his hands to shield his face, and as he went to step forward after the blow some one in the crowd pulled his feet from under him, and when he fell he got the kick he speaks of on the head behind his right ear. He remained unconscious until he came to and found himself 100 feet away on the other side of the pavilion. His evidence accounts for Silverstone and "Fat" and "Porky" and the one who pulled his feet from under him being in action. He says that when he was struck "they were all there on us."

John Williamson, another of this group, said that Elson did not reply when Silverstone took off his sweater and spoke to him saying, "I will give you a fight," but that his companion said "No," and then Silverstone whistled and then called "Fat," whereupon a big fellow ran up to Silverstone and then up the hill and came back with "a bunch." Price, a witness for the defence, heard the whistling at the time he met Dorothy Lozer. Williamson further deposes that when the big fellow ran up to Silverstone the latter told him to go and get "Porky" and the gang. They came, he said, from the pavilion and from the Zoo and from the east end of the path. He saw "Porky" hit Alex. Williamson, who bent forward and put his hands to his face, and he saw Silverstone, when his gang came, strike Elson, and Elson when struck fell on his knees. He says the rest of the gang were trying to hit Doré and Monet, but he himself made off and ran to find the police, down, and then off, the path until he got down to the flats; he then crossed the Don to the east and went home. Doré ran with him and so did Monet. He denies that any blows were struck by any of his group.

Doré, a third member of the group, said he saw Thompson (Porky) strike Williamson, and Silverstone strike Elson, who was in front, and told him he could take on "any three of us," and that Elson doubled up against the fence with his arms to his face, with two or three around him, and that nothing had been said by "us" except "No." He heard Silverstone call for Fat to bring the gang, and 12 to 15 arrived, and Alex. Williamson was struck and he himself was hit in the eye, and he then ran off as others were turning to strike him. He denies that any of them jumped on Silverstone or that they struck him.

This evidence, if believed, shews that a gang of 12 to 15 or thereabouts had, at the call of Silverstone, assembled from three directions. This received striking corroboration from Price and Dorothy Lozer herself. She says, naming Frank Thompson and Brinckman, that there were 10 or about 10 of the "gang" up there whom she saw. Price, speaking of the fight, said that "there were quite a few got into it." The evidence further establishes that Silverstone himself precipitated the fight by striking Elson; it shews that Alex. Williamson was struck and kicked and had his legs pulled from under him and became unconscious. All this, as I have described it, is supported by both Doré and John Williamson. But, while it necessarily leaves the further incidents of this fight in obscurity, it indicates its vigour and brutality. It is to be observed, however, that if Alex. Williamson was kicked senseless, and Elson was struck by Silverstone so that he was doubled up leaning against the fence or on his knees, and if Doré was struck in the eye, and others were trying to hit Doré and Monet, it establishes that the fracas was a general one and that Elson and those with him were over-powered or driven away. When this was accomplished these attackers callously withdrew, leaving Elson on the ground and nearly done to death.

How Elson came by the crushing in of his lungs and heart is not shewn, but the jury were well entitled to draw the inference that it was the result of this fight, and to find that the fight was precipitated by Silverstone, who had been drinking, and that it was participated in by those whom he called "his gang" and was continued until Alex. Williamson and Elson were knocked senseless and until Doré, Monet, and John Williamson had fled. This leaves only Donald Archer to be accounted for, and there is no evidence with regard to him.

Having given this evidence—all of which is entirely consistent, and was not shaken on cross-examination, except in the one parti-

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cular which I mentioned in Doré's case—the Crown—having also established the finding of Elson, the cause of his death, and described his wounds—called two members of the Toronto police force, Moshier and Black. Moshier says he found Silverstone at about 10.20 p.m. on the same night in Riverdale Park, together with quite a number of men in a group, and he arrested him. He describes his condition as that of one who had been drinking, though he would not say that he was drunk; that he was going around this group of young men with his fists up at different ones and swearing and cursing. Price, called for the defence, says he tried to take Silverstone home but he would not go home. Black, who was at No. 4 police station when Silverstone was brought in, said that he seemed to be in a stupid condition and that he could smell that he had been drinking wine. He found he was not capable of answering questions at that time satisfactorily, so he said nothing to him until next morning. He also deposed that he arrested "Fat," otherwise Burleigh, whom he found in Riverdale Park, as one of Silverstone's companions. He describes Silverstone as a general labourer, whom he had known for some time.

After this evidence had been given, the Crown put in a statement made on the day after the fight by Silverstone—after he had been duly cautioned by Black. It reads as follows:—

"About 7 p.m. of Friday, May 9th, 1930, I was in Riverdale Park at the railroad tracks, west side of Don river, at Winchester bridge. I was with 12 other fellows besides myself drinking wine. A gallon and three bottles. Agnew Burlie and myself got two girls and I went with one of them and Burlie went with the other. We walked to the path past the pavilion. There were 6 to 10 fellows against the fence, and when we passed some one said a dirty remark. I left the girl and went back, and a couple of them jumped on me; I yelled down for some of the rest of the fellows and they came up. I yelled for Porky and I don't know what happened after that."

This statement was unsworn and was evidence only because put in by the Crown as Silverstone's explanation relative to the matters in question in this prosecution.

It shewed that on the night in question Silverstone was in the park, with 12 other fellows, drinking wine, a gallon and three bottles, and that he walked in the park, passing 6 or 7 fellows standing against the fence and that he yelled for some of the rest of the fellows and for "Porky." It, however, contained more than that—it said that when he and "Fat" Burleigh passed this group

of 6 fellows, i.e., those with Elson, some one said a dirty remark and that he left the girl and went back and that a couple of them jumped on him. While put in as evidence for the Crown, the defence was entitled to take advantage of what was contained in it, and consequently could urge that Silverstone's defence was that when he went back he was jumped upon by some of the six who were leaning against or standing by the fence; in other words, that they began the fight. It does not deal with nor suggest that what happened afterwards was done in self-defence. It is quite consistent with the statement that, when they jumped on him, he resisted and then determined to carry the war into Africa and punish these young men for what they had done.

The effect of putting in an admission of the opposite party is set out in *Capital Trust Corporation v. Fowler* (1921), 50 O.L.R. 48, in these words (p. 52):—

"The law seems quite settled that, if an admission is used by one party, it must be used in its entirety, that is, everything must be read that is necessary to the understanding and appreciation of the meaning and extent of the admission. It is also equally established that, if a party uses an admission, he makes it evidence in the cause both as to himself and as to the opposite party in the litigation as well; but, if he desires to contradict or qualify any statement in it, he may do so. He can therefore give other evidence so to contradict or qualify it, but, if he does not see fit to do so, the whole of the admission remains as evidence in the cause for the benefit of both parties."

That being so, the effect of this admission should be considered.

The only general objection to the learned trial Judge's charge is that he did not put the defence of the prisoner fairly to the jury. When counsel was asked by this Court what was the defence, her answer was "self-defence." Now it is a singular thing that in the learned Judge's charge at p. 73 occurs the following:—

"Something was said by some witness (note, Price says that he saw a number of men striking at Morris and he was fighting back) to the effect that this fight took place by the accused in self-defence of himself. There is no defence of that kind urged by counsel, but self-defence is something altogether different from a man seeking a fight."

After reading the sections of the Code which deal with self-defence as a defence, and commenting on them, the learned Judge proceeded as follows:—

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"So you see, gentlemen, that it is the duty of a man who acts in self-defence against provoked assault before he can kill, to retreat as far as practicable." And "I call your attention again to the fact that, as far as Silverstone's statement goes, the defence is that an opprobrious remark was passed, that he went back and that the others set on him. Gentlemen, in law that is no defence to manslaughter unless it was in self-defence, of which you may think there is no evidence, except by the last witness."

Another circumstance which seems to lend weight to the learned trial Judge's remark that self-defence was not urged at the trial, is that when Silverstone was sentenced on the 28th November counsel who had defended him made no reference to self-defence in her remarks. All she urged was:—

"Silverstone has been convicted of manslaughter, but I would remind your lordship that there was no evidence that he struck the blow which caused the death of the boy, and there was no evidence that the initial step which led to the series of events culminating in the catastrophe of this boy's death was taken by him."

All this necessitates a very careful consideration of the admission or confession which was put in.

In the last few lines of the statement Silverstone says: "There were 6 to 10 fellows against the fence and when we passed some one said a dirty remark. I left the girl and went back and a couple of them jumped on me. I yelled down for some of the rest of the fellows and came up. I yelled for Porky. I do not know what happened after that."

There is not a word in the above as to self-defence. Self-defence is what happened after a couple of them had "jumped" on him, if that did in fact happen. There are no particulars or hint as to the necessity for any strenuous defence or for asking a gang to come to his assistance nor is there any indication of what he did or had to do or what was the danger or menace that he thought threatened him. The young men in the group of 6, other than the elder Williamson, were youths of 16 or thereabouts, while Silverstone is described as a general labourer though his age is not stated. How can self-defence requiring the brutality that happened be deduced from the bald statement that he was "jumped on." He had in fact challenged any 3 of them to fight, a moment or so before. When one considers the evidence that, when those called for by Silverstone came up, the result was to lay one of the other group unconscious, to crush in Elson's chest and heart, and

to make 3 of the others run away immediately, it needs a great deal of imagination to say that self-defence is made out. So far as the admission is concerned, and viewing the absence of anything throwing light on what his so called self-defence consisted of or required, I quite agree with the view of the learned trial Judge when he says that the statement of the prisoner given to the police "disposes of every defence except provocation."

Passing then from this particular excuse which, according to the learned trial Judge, was not urged at the trial, and which is not mentioned or suggested in the statement of Silverstone, there is nothing left but the evidence of George Price, called for the defence, who went down the hill after the fight had begun and said he saw 5 or 6 boys fighting with Silverstone, who was trying to defend himself, and that he himself stood where he was for a couple of minutes and then, when he thought one of the group was stepping towards him, he hit him, causing him to make off and run east on the path toward the bridge and that he himself left the fight which was going on in the shape of a number of fights.

There is not the smallest information from this witness beyond the vague fact that they were fighting or struggling, and nothing to shew that Silverstone was not more than a match for them. He did not himself think it necessary to go to Silverstone's assistance, for, after hitting one of the men, he left while the fight was still going on. No weaker case for self-defence and no case lacking even the smallest plausible foundation for such an excuse has ever come to my notice; and, no doubt, that was the reason it was not urged by counsel at the trial or after it.

Turning now to the other specific objections to the charge, I may say that their selection, while displaying much ingenuity, almost creates the impression that it is the Judge who is on trial here and not the accused. This is an attitude with which I have no sympathy. It prevails in other jurisdictions, resulting in frequent new trials and generally in the failure of justice altogether. I do not think that under our system of law the charge of a learned Judge to the jury, generally an intelligent body, should be scrutinised with such a degree of care as to magnify the slightest slip or omission. Our statute clearly lays it down that there must be something substantial or clearly material before a new trial will be granted for such a reason. I, however, must deal with these objections seriatim, though I am quite unable to regard any of them, even if established, as coming within the proviso in our statute.

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The proper rule on this subject is laid down in *Rex v. Immer* (1917), 13 Cr. App. R. 22, by Mr. Justice Darling (speaking for Bray, Avory, Sankey, Roche, JJ., and himself) in these words:—

“Applying the principles which I have read from the authorities, and regarding the summing-up as a whole, and not taking a word here and a line there and divorcing them from their context, we have come to the conclusion that the summing-up in this case did not violate the rules laid down by this Court, although we do not say that it was a model summing-up. A summing-up is sufficient if it is not unfair to the accused and if points are not withheld which it is reasonable to suppose are not already properly before the jury.”

The principles he refers to are set out in *Stoddart's Case* (1909), 2 Cr. App. R. 217, and include a quotation in the words of Lord Esher thus (pp. 245, 246):—

“Probably no summing-up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of twenty days, would fail to be open to some objection. To quote Lord Esher's words in *Abrath v. North Eastern Railway Co.* (1883), 11 Q.B.D. 440, at 452: ‘It is no misdirection not to tell the jury everything which might have been told them . . . .’ Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen” but “to deal with valid objections to matters which may have led to a miscarriage of justice.”

The first of these objections is in regard to a remark said to have been made during the address of the jury of counsel for the accused when she was relying upon his admission put in by the Crown. The Crown counsel is reported to have said that the statement she was referring to was not a sworn statement. This is magnified into a comment by Crown counsel on the fact that Silverstone had not gone into the box during the trial. In other words, a remark directed to the condition and form of a statement made long antecedent to the trial is being twisted into a comment on what was going on in court at the trial. To my mind it is hard to see why a remark, perfectly correct in itself, and true in fact, could not be made by Crown counsel in regard to such a statement. It was perfectly proper, and it seems to me to border on absurdity to say that it was a present comment on the absence of the defendant

from the witness-box. Mr. Justice Riddell in *Rex v. Kaplansky* (1922) 51 O.L.R. 587, had to deal with a somewhat similar point and did so adversely to the prisoner. Crown counsel has, however, in an affidavit, made it quite clear that his remark had no bearing on the point now taken. To my mind his statement would have been quite enough and his affidavit completely disposes of the point raised.

The next objection is to be found at p. 74 where the learned Judge in his charge mentions Dorothy Lozer as saying that because of the alleged insulting remark the accused broke away from her and went back "to fight." This is claimed to be a misstatement. When we look at the evidence itself, it appears that Lozer says: "I told him" (Detective Black, on the evening in question) there was "a dirty remark passed and then Morris went back and fought them." In view of the evidence given by the Crown that Morris did go back and asked if they wanted to fight and on their declining said, "You will get a fight whether you want it or not," there seems to be little difference between the remark to Detective Black and the statement in the charge. While it is not exactly what the girl Lozer said, it seems to me it might well be implied from the facts of the case and from the remark which the woman made, and was in no sense misleading; for, if he went back and fought, he no doubt went back for that purpose, in view of the alleged remark, and certainly so upon all the other evidence in the case.

But the matter is put right, if it needed any explanation, in what was said later, in these words:—

"Now, gentlemen, you have to decide whether the accused came back after having passed the deceased—and that evidence is uncontradicted—and began the affray. That part of the evidence is contradicted to this extent that, although the Lozer woman says he went back after the remark, one of the witnesses says that some of the other party fell upon the accused."

This seems to point out accurately the evidence on the point, and I can see no prejudice to the accused in it.

The next objection is that the learned trial Judge failed to repeat the concluding portion of sec. 69, viz., subsec. 2, of the Criminal Code as to the responsibility of parties to offences.

This objection is one that deserves a little careful consideration. It is the fact that that portion of the section was read out to the jury, so that the only point to be dealt with is whether it should have been repeated by way of emphasis or its import as applied to

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such a case as this explained. This latter point is really the gist of the objection, as it can hardly be laid down as law that a Judge must repeat his remarks to the jury on every point before he will be considered to have properly instructed them. The common intention which the subsection describes may be formed on the spur of the moment, as it must have been here. The call of Silverstone was answered, and some 10 to 15 men appeared from various parts and found Silverstone engaged in a fight. They saw that the opposing party were 6, and that they outnumbered them two to one. The evidence shews that Porky (Thompson) hit Alex. Williamson knocking him senseless. It is shewn that Alex. Williamson, after being hit, was struck again from another quarter, and, either by the party who struck the second blow or by some one else, had his legs pulled from under him, bringing him senseless to the ground. What happened afterwards he does not know, as he awoke from his unconscious condition later on. Silverstone was also seen striking Elson, bringing him, according to one witness, to his knees. He is afterwards found dead with his chest and lungs crushed in. Some other member of the attackers struck Doré, who ran away with two others. This accounts for 5 of the first group. None of the attacking gang, including Porky and Fat, is called, although there were some 10 or 15 of them engaged.

From the consequences of their acts, their purpose, I think, must be judged. What was it? As I have said, the objection is really that the Judge should have told the jury that manslaughter was not and could not have been a probable consequence of their unlawful purpose. There was an unlawful purpose undoubtedly, and that unlawful purpose was to join in a fight, which was none of their quarrel. The probable consequence of their common purpose was not necessarily manslaughter, for when the fight was over Elson was not dead but lying unconscious on the ground where his attackers had left him to die. Elson was a delicate boy who had had tuberculosis and recovered, and at his age, according to Dr. Robinson, the ribs of a young man of sixteen are fairly pliable and it is fairly easy to produce a fracture of the chest without injuring any of the ribs. The doctor further pointed out that his condition must have been caused by contact with a knee or a foot or some firm object and could be produced by jumping on him with the back of the heels or the full foot.

Now what was the purpose of this fight? Judging from what happened and in view of the fewness of the first group, the size of

the second group, and the terrible injuries to Elson and the knocking out of Alex. Williamson, it seems to me it was a ruthless attack, and the purpose might very fairly be said to be to wipe out or disable the first group. If that is so, are we to shut our eyes to the fact that any one who assaults another, especially a youth as young as 16, in a manner or with the vigour which produced injuries such as those he suffered, must have had an intention of doing more than merely fighting a round, and that the common intention and purpose involved that which might well result in and could hardly fail to cause serious bodily injury. I cannot myself see why, if that was the common purpose, the likelihood of serious wounds could be disregarded as a probable consequence. For that reason I am not impressed with the suggestion that in the learned trial Judge's charge he was bound to do more than he did. Is the Judge bound to find on the facts what the common purpose was and to tell the jury that as a matter of law it is so and so? Or are the jury not the judges of what the common purpose was? I think they are. They must be the tribunal to determine whether the common purpose was or ought to have been known to those who are being tried, just as they must determine, in negligence cases, for example, whether a chauffeur knew or ought to have known the danger that threatened. To hold that the Judge is to determine what was the common purpose (a question of fact) and whether it was known or ought to have been known to the individual on trial (another question of fact) would be to prevent the jury from drawing any inference from what happened.

In this case, if the learned Judge had attempted to rule that manslaughter lay outside the common purpose, could he have also defined the limits of injury comprised in the common purpose? The learned Judge's statement, after having read to the jury the words of sec. 2 of sec. 69—"If all are engaged with a common design to commit an offence, all are guilty though only one strikes the fatal blow"—is sufficient, and if the Judge had gone on to say, in addition, that neither grievous bodily harm nor manslaughter could have been a probable consequence of any fight such as this, he would, to my mind, have stated the law wrongly. I would give a jury, who had heard the evidence given by the Crown and who realised what violence it was which produced such a death, and who listened to the words of the Code read out to them, credit for sufficient intelligence to comprehend that, in this case, the common purpose must have been to wipe out or severely punish those who

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had offended Silverstone, and that they could not have reached their conclusion without the fullest consciousness that the common purpose was no mere scuffle or fisticuffs, but was a reckless and inhuman hoodlum attack which knew no mercy. It was the right of the jury and not of the Judge to decide from the circumstances what was the probable consequence or what ought to have been foreseen as such. The jury have the facts, and the inference is for them. Where the criminal law desires to state the exact purpose which must or should be contemplated as probable, it has taken care, in our Code, to specify it as in sec. 259, para. (a), where the probability of death is specially mentioned. The probable consequence cannot, it seems to me, exclude that which happened without more and better evidence than we have here. We are face to face with the fact that in this fight grievous bodily harm, afterwards resulting in death, was inflicted, and inflicted unnecessarily, and that blows were struck sufficient to render another man unconscious. To ask the Court to say that the probable consequence of those actions must exclude from consideration what actually happened as a probable consequence or to treat it as being unforeseen by any reasonable man, is further, I think, than any court should go.

In this case clear evidence has been given by those who were Elson's companions of just what happened in Riverdale Park on the 9th May, 1930. None of it is denied by any one of those who did him to death, although the names of 3 of them are known. They were not called by the defence nor did Silverstone venture to swear to what he had suggested in his written statement or to exculpate himself in any way. Under such circumstances we are asked to set aside the conviction of a man who, under the influence of drink, which persisted long after the fight was over, and who refused to go home from the scene with his friend, headed a gang of 10 to 15 hoodlums who joined him in causing Elson's serious and brutal injuries which led to his death. Silverstone and the rest of his associates left Elson on the cinder path, careless whether he died or not.

The findings of the jury are not and could not be attacked, but unsubstantial objections to the Judge's charge to them are set up as reasons why the conviction by the jury should be set aside. Our law requires (Criminal Code, sec. 1014) that a substantial wrong or miscarriage of justice shall actually have occurred before any objection is given effect to by quashing a conviction. No such

ground exists here, in my judgment, and I would unhesitatingly refuse leave and dismiss the appeal. To do otherwise would be an encouragement of lawlessness and afford the accused a chance to fill up the gaps in the case in the hope that his counsel might find some more weighty reasons for his acquittal than are apparent now.

None of the objections to the charge of the learned trial Judge were taken at the trial, either before or after the jury retired. This is not only unfair to the Judge but to the parties, as omissions or mistakes which could readily be corrected on the spot, if called to the Judge's attention, can only be put right by granting a new trial with all its attendant expense. I desire to record my view that such objections raised for the first time in the court of appeal, as here, should not be given effect to. In certain cases objections may be of such a character that a different course should be taken, if a serious miscarriage of justice would, in the opinion of the Court, result if they were ignored.

*New trial directed (HODGINS, J.A., dissenting).*

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#### [APPELLATE DIVISION.]

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*Negligence—Motor-vehicles upon Highway—Collision—Action Brought by Owner and Driver of one Vehicle and Passenger against Owner and Driver of the other—Negligence Found against both Drivers—Degrees of Fault—Damages of Passenger not Identified with Driver—Contribution or Indemnity—Negligence Act, 1930—Third Party Procedure—Rules 165 et seq.—Dismissal of Action without Prejudice to Claim for Contribution—Condition upon which this Relief Granted.*

The plaintiffs, father and son, sued the defendant for damages occasioned to them in a collision upon a highway of a motor-car owned and operated by the son, in which the father was a passenger, with a motor-car owned and operated by the defendant. The trial Judge, sitting without a jury, found that both the defendant and the plaintiff-driver were negligent, and that the former was responsible to the extent of 60 per cent. and the latter to the extent of 40 per cent. The father's damages for his personal injuries were assessed at \$3,500, and the son's for injury to his car at \$82.42. The trial Judge accordingly awarded the father, who was free from blame, the full amount of his damages against the defendant and the son 60 per cent. of his damages:—

*Held*, upon the defendant's appeal, that there was no ground for disturbing the finding as to the damages sustained nor as to the respective shares of blame.

It was contended that the father was so identified with the negligence of the son as to preclude him from recovering more than a proportionate part of his damages:—

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*Held*, that the mere fact of a passenger being a passenger does not so identify him with his driver as to make him responsible for the driver's negligence; and here there was, upon the facts proved, no such identification as to make the negligence of the driver attributable to the passenger, nor were there circumstances indicating that the passenger was himself negligent—he took no part in the operation or management of the car, and was not responsible for what took place.

It was suggested (though the point was not taken in the notice of appeal or in the pleadings) that the case fell within the Negligence Act, 1930, 20 Geo. V. ch. 27; and that, as the action was founded upon the fault or negligence of both drivers, the Court should give the defendant a right of contribution and indemnity against the plaintiff-driver for 40 per cent. of the damages awarded to the passenger:—

*Held*, that this claim was not open upon the record: Rules 165 *et seq.* provide for the procedure to be followed where a defendant claims contribution or indemnity; Rule 165 deals with the procedure where the claim is against a person not a party to the action; and Rule 170 applies to cases in which the claim is against a co-defendant; but there is no provision clearly applicable to a claim against a co-plaintiff; and, in the absence of any claim for contribution or indemnity, the point was not ripe for adjudication.

But, in order to prevent any injustice to the defendant, if he was in truth entitled to relief over against the son with respect to the damages payable to the father, the dismissal of the action should be without prejudice to any application that the defendant might make for leave to proceed by appropriate third party procedure against the son; this relief being granted upon the terms and condition that the whole matter should be at large as between the defendant and the driver-plaintiff, and that the determination at the trial as to the respective degrees of negligence should not be given in evidence nor be regarded as *res judicata*.

AN appeal by the defendant from the judgment of ROSE, C.J., at the trial without a jury, in favour of the plaintiffs (father and son) in an action for damages for injuries sustained by them in a collision of motor-vehicles upon a highway, caused, as the plaintiffs alleged, by the negligence of the defendant.

January 26. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*R. H. Greer*, K.C., for the appellant, argued that the learned trial Judge erred in failing to identify the father with the negligence of the son. Both were out on a drive for pleasure, and so, although the son alone was the driver and in complete control of the car, it was to some extent a joint adventure: *Flood v. Village of London West* (1896), 23 A.R. 530; *Dixon v. Grand Trunk Railway Co.* (1920), 47 O.L.R. 115, at p. 118. The father, sitting in the front seat of the car, saw the defendant's car a considerable time before his son (the driver) saw it. It was the duty of the father to have warned his son of the approach of the defendant's car. His

failure to do so constitutes negligence on his part: *Gauley v. Canadian Pacific Railway Co.* (1930), 65 O.L.R. 477, *per* Latchford, C.J., at p. 481. The learned trial Judge also erred in not applying the principle of the Contributory Negligence Act, 1930, 20 Geo. V. ch. 27, to the facts of this case. The defendant is entitled to contribution from the plaintiff-driver, a joint tort-feasor, to the extent of 40 per cent. of the damages awarded. The statute by its language, sec. 3, "In any action founded upon the fault or negligence of two or more persons . . .," is not confined, as the learned trial Judge found, to the negligence of two or more defendants. Reference to *Lecomte v. Bell Telephone Co. of Canada* (1931), 66 O.L.R. 580; *Topping v. Oshawa Railway Co.* (1931), 66 O.L.R. 618. The Act does not contemplate the necessity of making a claim in the pleadings against a person already a party to the action. If such a claim is necessary and has been overlooked, this Court can and should, upon terms if necessary, remedy the formal defects under Rule 183.

*J. G. Logan*, for the plaintiffs, respondents, stated that he had no objection to a new trial as long as the plaintiff-driver is entitled to contest the 40 per cent. liability, which was not adjudicated on in the trial of the father's claim.

February 9. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal by the defendant from the judgment of Rose, C.J., pronounced at the hearing of the action on the 17th November, 1930.

The action is brought by John Mara and his son William Henry Mara against Dr. Hartley to recover damages sustained by reason of a collision of the car owned and operated by the plaintiff William Henry Mara, in which his father was a passenger, with a car owned and operated by the defendant. The collision took place in broad daylight at the intersection of two roads in the township of Sarnia.

The learned trial Judge found that both the defendant and the plaintiff William Henry Mara were at fault, and that the defendant was responsible to the extent of 60 per cent. and the plaintiff William Henry Mara to the extent of 40 per cent.

John Mara was seriously injured, and his damages have been assessed at \$3,500; the son was not personally injured, but his car sustained damage amounting to \$82.42; the defendant and his vehicle were apparently uninjured. The learned trial Judge accordingly awarded the plaintiff John Mara—who was free from all blame—the full amount of his damages against the defendant, and

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App. Div. he awarded William Henry Mara 60 per cent. of his damages,  
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After a careful perusal of the evidence, it is plain that there is no ground for disturbing the finding of the learned trial Judge as to the damages sustained nor as to the respective shares of the defendant and the plaintiff William Henry Mara in bringing about the accident.

It is then argued by the defendant that the father was so identified with the negligence of the son as to preclude his right to recover for more than a proportionate part of his damage. It is clearly established that the mere fact of a passenger being a passenger does not so identify him with his driver as to make the passenger responsible for the negligence of the driver. It may be that in some cases there is in fact such an identification as to make the negligence of the actual driver attributable to the passenger, or there may well be circumstances under which the passenger himself is negligent, but upon the facts proved in this case there was nothing to indicate that John Mara was in any way responsible for what took place upon this occasion. He is an old gentleman, 75 years of age, superannuated from his business, and he took no part whatever in the operation or management of the car in which he was being driven.

The point mainly argued is one not taken in the notice of appeal or in the pleadings. It is suggested that the case falls within the provisions of the Negligence Act, 1930, 20 Geo. V. ch. 27; and that, as the action is founded upon the fault or negligence of both the plaintiff William Henry Mara and the defendant, the Court should give to the defendant a right of contribution and indemnity against the plaintiff the son for 40 per cent. of the damages recovered by the plaintiff the father.

The learned trial Judge took the view that this case did not fall within the statute. He says: "I read the section as applying in the case in which the plaintiff founds his action upon an allegation of negligence on the part of two defendants, not in a case in which the plaintiff founds his actions upon an allegation of negligence on the part of one defendant and the Court finds that both the defendant and another person were negligent. The section itself seems to me to shew that this is the case in which it applies. Provision is made for what is to happen if both the negligent persons are found liable. Now a person cannot be found liable unless a claim is presented against him, and no claim is presented against the plaintiff William Henry

Mara, so there is no case for the apportionment of Mr. John Mara's damages." I am not ready to assent to the view taken by the learned trial Judge as to the construction of the statute; I think the statute may well have a wider meaning, and that it applies whenever it is ascertained upon the facts that the action is "founded upon the fault or negligence of two or more persons" (sec. 2). In that case "each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent." I cannot believe that the Legislature intends to make this right to contribution between wrongdoers depend upon the election of the plaintiff as to whom he will sue. It is not, however, necessary to determine this question, and it must still be regarded as an open question, for it is plain that the claim put forward is not open upon this record. Rules 165 *et seq.* provide for the procedure to be followed where a defendant claims contribution or indemnity. Rule 165 deals with the procedure to be followed where a claim is against any person not a party to the action; Rule 170 deals with cases in which the claim is against a co-defendant; but there does not appear to be any provision clearly applicable to the case in which the claim is against a co-plaintiff. This may be met by applying the general principle enunciated in the first rule, or it may be held that where several plaintiffs, each having distinct causes of action, unite in one action, a co-plaintiff is not a party to the action so far as the plaintiff whose claim is in question is concerned. Be that as it may, in the absence of any claim for contribution or indemnity, the matter is not ripe for adjudication. It follows that the appeal of the defendant should be dismissed with costs and that the judgment in favour of the plaintiffs should stand.

In order to prevent any injustice to the defendant, if he is in truth entitled to relief over or indemnity against the son with respect to the damages payable to the father, I would direct the dismissal of the action to be without prejudice to any application that the defendant may make for leave to proceed by appropriate third party procedure as against the son. I suggest this to avoid any contention arising as to the right to indemnity and relief over being confined to the power of the Court in the action brought, as sec. 3 of the statute commences with words which may possibly limit the generality of the later provisions of the clause "in any action brought," &c.

*Judgment accordingly.*

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J.A.      February 27. The motion was heard by the same Court.  
             *Lewis Duncan*, for the plaintiffs.  
             *J. R. Cartwright*, for the defendant.

March 9. The judgment of the Court was read by MIDDLETON, J.A.:—Motion by the plaintiffs to vary the minutes of judgment as settled by the Registrar so as to insert a provision that, in the event of proceedings being taken by the defendant against the plaintiff William Henry Mara for contribution or indemnity with respect to the amount awarded to the plaintiff John Mara, the apportionment made at the trial of the degree of negligence resulting in the accident, with respect to the small sum awarded to William Henry Mara against the defendant for damage with regard to the car, shall not be admitted in evidence or deemed to be *res judicata* with reference to any claim which may be put forward in the contemplated proceedings.

After the argument of this motion, and without any leave from the Court, counsel for the plaintiffs filed a memorandum seeking to re-open the entire question and to have the minutes further varied by eliminating that which had been determined by our judgment, that the defendant should be at liberty to apply in this action for leave to proceed against the plaintiff William Henry Mara for contribution or indemnity with respect to the sum awarded to the plaintiff John Mara.

We do not think it is permissible to the defendant to re-argue this question, nor do we think that our judgment as pronounced should be varied in that respect. We do, however, think that the plaintiff William Henry Mara is entitled to have it made plain that, as a term of the granting of relief to the defendant as provided by clause 2 of the minutes as settled, this relief is granted upon the term and condition that the whole matter shall be at large as between the defendant and William Henry Mara, and that the determination at the trial as to the respective degrees of negligence shall neither be given in evidence nor be regarded as *res judicata*.

As the plaintiff William Henry Mara has failed on one of the contentions now put forward and succeeded on the other, there should be no costs of this motion.

*Judgment varied accordingly.*

## [APPELLATE DIVISION.]

TRUSTEE OF THE PROPERTY OF C. E. PLAIN LTD. v. KENLEY AND  
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Feb. 6.

*Company—Shareholders and Directors—Mortgage—Invalidity—Absence of Consideration—Impairment of Capital—Fraud upon Company and Creditors—Action by Trustee in Bankruptcy of Company—Status as Representing Company and Creditors.*

The judgment of ORDE, J.A. (1930), 66 O.L.R. 179, affirmed.

AN appeal by the defendants from the judgment of ORDE, J.A. (1930), 66 O.L.R. 179.

January 28. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

*O. M. Biggar*, K.C., for the appellants, contended that the learned trial Judge misapplied the law of *ultra vires*. The question of *ultra vires* turns on whether there was a reduction of capital by reason of the giving of the mortgage. The Judge says that because it is a joint stock company operating under a charter it has no power to give away its assets so as to reduce its capital, but he fails to inquire whether or not the capital was in fact reduced. He also erred in taking into consideration events which happened subsequently and which are irrelevant to the question whether or not the giving of the mortgage was *ultra vires* at the time it was given. He has found that there was no intent to defraud, but he has based his judgment on constructive fraud because of the fact that the effect of the mortgage was to reduce the capital and so prejudice the subsequent creditors because it was not shewn in the company's statement. This omission is however shewn to be the act of Brown, the subsequent owner of the business, and cannot be charged against the present defendants. What was given away by the mortgage was surplus and not part of the capital. If there was an adequate surplus, it is irrelevant, as far as the plaintiff is concerned, that the giving was not in the form of a dividend distribution. In the absence of fraud, the subsequent creditors cannot attack what the shareholders do with the surplus assets of the company, provided it does not come within the statutory prohibitions. Reference to *In re City Equitable Fire Insurance Co.*, [1925] Ch. 407, at pp. 476-7; *Dovey v. Cory*, [1901] A.C. 477.

*T. A. Beament*, K.C., and *A. W. Beament*, for the plaintiff, respondent, argued that it was never intended in this transaction

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to declare or pay a dividend. Even if there had been a sufficient surplus to justify the payment of a dividend, no such was in fact paid. No payment of dividend having been made, the plaintiff asks the court to prevent payment being made by the company under this mortgage, which was given without consideration. It was at most a promise to pay in 1931 the amount of the mortgage. In the present circumstances of the insolvency of the company, it is most improper for the directors to pay it out of the assets to the prejudice of the creditors. The parties having had no intention of declaring a dividend, the mortgagee cannot now assert that the mortgage was a dividend. It was a document without consideration. If it was made to secure payment for shares sold by the mortgagee to Brown, it was *ultra vires* of the company, and therefore subject to attack by the creditors. Reference to *Northern Electric and Manufacturing Co. Ltd. v. Cordova Mines Ltd.* (1914), 31 O.L.R. 221, reversed in *S.C.*, *sub nom. Hughes v. Northern Electric and Manufacturing Co.* (1915), 50 Can. S.C.R. 626; *Re Inrig Shoe Co. Ltd.* (1924), 27 O.W.N. 110, 5 C.B.R. 157; *Lagunas Nitrate Co. Ltd. v. Schroeder and Co. and Schmidt* (1901), 85 L.T.R. 22.

February 6. The judgment of the Court was read by HODGINS, J.A.—Appeal by the defendants from the judgment of Orde, J.A., after a trial at Ottawa without a jury. The plaintiff is the authorised assignor of a limited company, C. E. Plain Ltd., incorporated on the 8th March, 1911, and sues the defendants to set aside a mortgage on the lands of the company for \$25,000, made by the company to the defendant Kenley and by her assigned to her co-defendants on the 6th April, 1927. The mortgage is dated the 1st August, 1926, but did not become effectual till the 26th March, 1927.

C. E. Plain, formerly manager of the company, died in September, 1926, and his daughter is the defendant Kenley, to whom, on the 1st June, 1925, he transferred his shares in the company, 564 in number, out of 570 shares. She later retransferred 3 shares to her father and two others. She became a director of the company and continued to hold that position until after the date of the impeached transaction. Her co-defendant is assignee not only of the mortgage in question, but of her shares and those of her mother and son, 567 in all, which were assigned to them on the 8th April, 1927. Three shares are outstanding, one owned by Andrew C. Brown and one each by persons named Hodgson. Brown was

a director from the 5th March, 1927, till the 26th April, 1930, and he was treasurer and practically manager of the company from its incorporation. C. E. Plain was president, but after 1925, owing to illness, took little part in the business of the company.

Brown, in 1926, formed the project of acquiring control of the business, and this was apparently satisfactory to the defendant Mrs. Kenley, for in August, 1926, she and Brown entered into an agreement described by the learned trial Judge in this way (66 O.L.R. at pp. 182, 183):—

“The agreement is dated the 6th August, 1926, and, after reciting that Brown is desirous of purchasing shares in the company and that Mrs. Kenley owns and controls 567 out of the 570 issued shares, which Brown has offered to purchase for \$35,000, and further that the company has agreed to sell all its real estate to Mrs. Kenley for the sum of \$1, which she has agreed subsequently to sell back to the company for \$25,000, it proceeds to give effect to the purpose of the agreement. The company first covenants to sell its real estate to Mrs. Kenley for the sum of \$1 free from all encumbrances. She then agrees to sell to Brown and he agrees to purchase 567 fully paid-up shares of the company for \$35,000, of which \$500 was then paid to her, and the remaining \$34,500 was to be paid on the 1st September, 1926. She also agreed to sell to the company and it agreed to buy from her the real estate for \$25,000, to be paid to her in 4 instalments of \$3,000 each on the 6th August, 1927, 1928, 1929, and 1930, respectively, and the remaining \$13,000 on the 6th August, 1931, with interest at 6 per cent. per annum, such payments to be secured by a first mortgage upon the lands. There was in this agreement a somewhat odd provision embodied in para. 9. It was agreed by that paragraph that, if Brown notified Mrs. Kenley by the 28th August, 1926, of his intention so to do, he might pay her, in addition to the \$35,000 (which he was to pay for the shares) the sum of \$25,000 (which was the same amount as the company was to pay for the reconveyance of its own real estate), and in that event the provisions of the agreement respecting the transfer of the real estate by the company to Mrs. Kenley and the resale thereof by her to it for \$25,000 were to become null and void. If this provision had been carried out, it would have meant in substance that Brown would be paying \$60,000 for 567 out of the 570 shares of the company, and the company's assets would remain intact, in no way affected by the bargain between Mrs. Kenley and Brown. But, if the option were not exercised, the result would be that the company would have

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App. Div. 1931. given to Mrs. Kenley a mortgage upon its real estate for \$25,000 without any real consideration therefor."

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This agreement was approved by a meeting of the company's directors, Brown, Mrs. Kenley, and Young (a grandson of Plain), on the 6th August, 1926. As Brown could not carry out the above agreement, the situation was considered at another board meeting (present Brown, Young, and A. C. Hill), held on the 26th March, 1927, at which, as stated by the learned trial Judge (66 O.L.R. at p. 183):—

"It was then resolved that the company should sell lots 13 on the south side of York-street and 52 and 53 on the south side of Belmont-avenue, in the city of Ottawa, to Mrs. Kenley for \$1, and that the agreement be approved and executed by the proper officers of the company, and that for the purpose of carrying out the terms, stipulations, and conditions of the agreement, the proper officers of the company be authorised to execute all necessary deeds and mortgages.

"The new agreement was thereupon executed by Mrs. Kenley, Brown, and the company, its corporate seal being countersigned by Mrs. Kenley as president and Young as secretary.

"The new agreement is dated the 26th March, 1927, and is between the same three parties as the earlier one."

This agreement was implemented and the company's lands were conveyed to Mrs. Kenley and by her reconveyed on the same day to the company, and were at once mortgaged to Mrs. Kenley for \$25,000. This is the mortgage in question.

The appellant contends that this is a domestic matter and one not of capital but of undistributed profits in which creditors could have no concern. The authorised assignee represents the company as well as creditors, and his title to maintain this action in right of both was not argued before us. Without therefore desiring to go into the question of his exact status, I assume that under sec. 25 of the Bankruptcy Act he can, for the company, assert a right to recover the assets of the company, freed from a lien thereon, if such lien was created by the directors, and if they were acting not for the benefit of the company but for their own ends and interests or for those of any one or more of them.

Lord Wrenbury (then Buckley, J.) in *In re Anglo-French Exploration Co.*, [1902] 2 Ch. 845, 853, says:—

"On the liability side of the balance-sheet will be found, amongst other things, the amount of capital paid up by share-

holders upon their shares. This is an amount in respect of which the creditor has certain rights. It must not be used except for capital purposes."

And he adds (p. 852): "The key to the solution of all questions as to reduction of capital lies in remembering that the corporation owes a duty, not to its shareholders only, but to its creditors also."

I agree with counsel for the appellant, if the question to be decided is whether this \$25,000, treated either as a liability or as a payment, is chargeable against capital or against income, that the credit and debit items are equally open to attack and to scrutiny and revaluation. I would, however, hesitate to treat real property and buildings as an investment of undistributed profits, without very clear proof of their financial origin and of the way in which the company had treated them in its yearly balance-sheets. What was done here did not purport to be a distribution of profit, and I do not think that it is necessary upon that question to enter into the investigation of the company's balance-sheets.

What does matter is the power of the directors to reduce the assets, by increasing its liabilities, not for the benefit of the company but for the personal advantage of the company's manager in a financial operation which, although it was satisfactory to the principal shareholder and was in her interest, could not be said to be, even in the situation then existing, within the powers of the directors. A company is not allowed to buy its own shares, and the directors had no right, in my judgment, to encumber the company's real property to the extent of \$25,000, and to make the company liable to pay that amount, for the purpose of assisting a shareholder to buy another member's shares, and thus assuming meantime a large portion of the purchase-price. This is a purpose to which the company's assets could not legally be put.

According to the minute-book, Mrs. Kenley and Brown both were present at the meeting on the 6th August, 1926, when the original agreement of the 1st August, 1926, was approved and directed to be executed by the proper officers of the company.

On the next occasion, the 26th March, 1927, Mrs. Kenley was not present, but Brown was, and there is no mention of his having refrained from voting with Young and Hill, the other directors. But, as Mrs. Kenley had agreed to and did vote for the original agreement out of which the so-called new agreement arose, her knowledge of and her assent to it as a director may well be

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assumed, as she did not cease to be a director and president of the company until the 8th April, 1927. Her shares were represented by her co-defendant at the annual general meeting held on the 4th May, 1927, when the April, 1927, agreement was ratified, and this ratification could not have been given without her assent through her co-defendant, as her shares comprised almost the whole stock issue.

The importance and necessity of a disinterested quorum when any contract is made in which a director is personally interested, is emphasised in *In re North Eastern Insurance Co. Ltd.*, [1919] 1 Ch. 198, by P.O. Lawrence, J. (now L.J.) The Ontario Companies Act, R.S.O. 1927, ch. 218, secs. 95 and 96, seems to have been completely ignored at the directors' and general meetings by those interested here.

It is said that, even in regard to acts which are *ultra vires* of the directors, acquiescence is an answer and renders them unimpeachable. But this acquiescence must be by all shareholders, and here we are informed that there are two who have not agreed, though their opposition is nowhere shewn.

Stripped of the form in which the arrangement come to is clothed, namely, the making of a mortgage on its real estate to Mrs. Kenley for \$25,000, it may be described as a security given to a director who was also a shareholder, and almost the sole proprietor of all the shares in the company, to be held by her on the lands of the company until Brown, the company's manager, could pay for all her shares and so control the company and its business. The purchase-price of the shares was in reality \$60,000, of which \$35,000 was to be paid by Brown partly in cash and thereafter in instalments, and this mortgage was to be held until it became due on the 1st August, 1931, Brown agreeing to secure collaterally both the \$35,000 and the \$25,000 mortgage by transferring to Mrs. Kenley a promissory note for \$25,000 to be made or endorsed by one Joseph Moynihan and an insurance policy on Brown's life for \$25,000.

In simple words, the company assumed a liability for \$25,000 which Brown, its manager, was to pay as part payment for Mrs. Kenley's shares, and so help him to gain control.

No doubt there was nothing of bad faith in this, although the form of the transaction, and the omission of it by Brown from the company's books, from which he knew that the auditors in January, 1928, and 1929, would get their information, seems

rather unusual, and somewhat suspicious. It is a dealing which the plaintiff, as representing the company and in the interests of the creditors, might well question.

It has been laid down that a company cannot issue shares for the purpose of acquiring control of a company, for the reason that in issuing shares they are trustees of a fiduciary power given to them to do so, not for the benefit of individual shareholders but to be exercised *bonâ fide* for the general advantage of the company alone and not for other purposes. (See *Piercy v. S. Mills & Co. Ltd.*, [1920] 1 Ch. 77.)

Palmer, in the 11th edition of his work on Company Law, says at p. 193:—

“In exercising these powers” (i.e. those authorised or not forbidden), “whether general or special, directors must always bear in mind that they are trustees for the company, and must exercise the powers for the benefit of the company, and for that alone.”

Lord Lindley, M.R., says in *Allen v. Gold Reefs of West Africa Ltd.*, [1900] 1 Ch. 656, at p. 671:—

“Wide, however, as the language of sec. 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bonâ fide* for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed.”

And they are trustees of the power of employing the funds of the company: *Great Eastern Railway Co. v. Turner* (1872), L.R. 8 Ch. 149, 152; *In re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450; *Percival v. Wright*, [1902] 2 Ch. 421, 425. See also *Bonisteel v. Collis Leather Co.* (1919), 45 O.L.R. 195.

The editors of the 11th edition of Buckley on the Companies Acts speak thus of the effects of irregular acts, though within the company's powers:—

“If a director, acting beyond any power the company can confer on him, parts with the company's money, the fact that he acted *bonâ fide* and with the approval of the majority of the shareholders is no defence to an action by the company.”

And where the dealing is between the company and a director the general principle is as stated by Lord Hatherley, L.C., in

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1931. 6 Ch. 558, 566, thus:—

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“A person holding a fiduciary position with regard to a company cannot obtain for himself a benefit derived from the employment of the funds of the company in any matter in which he, the director, may happen to be engaged.”

At the top of p. 568, he cites with approval the language of Knight Bruce, V.-C., in *Benson v. Heathorn* (1842), 1 Y. & C. Ch. 326:—

“The general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee applies with still greater force to the state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance.”

The length to which this doctrine is carried may be seen in the case of *Cook v. Deeks*, [1916] 1 A.C. 554.

In my judgment, the transaction cannot be supported for the following reasons:—

1. The directors cannot part with or encumber the assets of the company for the benefit of one of their number even though the assistance to him in his scheme may result in attaching his influence and services to the company and its business.

2. This prohibition applies in a case where it is sought by one director to secure control of the company, its assets and business, even with the assent of the director or shareholder holding control by a majority of the issued stock.

3. That the facts already outlined clearly shew that, while the company received no consideration for the mortgage, which was given solely to assist Brown to provide the \$60,000 required to buy Mrs. Kenley's 567 shares, the consideration was one which, in any case, the company could not legally receive, as it could not indirectly do that which it could not do directly.

4. That the creditors have, in the circumstances of this case, a right to dispute the validity of a security on the capital assets passing from the bankrupt, placed there by the directors, and to question it on the ground of breach of trust.

5. The creditors have also the right to attack the mortgage as based upon a purely voluntary transfer which, as here, vests in the donee, without any consideration passing from her, the whole estate in the company's lands.

I would dismiss the appeal with costs.

*Judgment accordingly.*

[IN CHAMBERS.]

CAMERON V. MURRAY.

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Feb. 9.

*Negligence—Motor-vehicles upon Highway—Collision—Action by Driver of one Vehicle and three Passengers against Personal Representatives of Owner and Driver of the other—Order Striking out Name of Driver-plaintiff—Negligence Act, 1930, secs. 2, 3, 4, 6—Third Party Notice—Rule 165.*

The plaintiff C., driving his own motor-car upon a highway, with his co-plaintiffs as passengers, came into collision with the motor-car of D., driven by himself. The plaintiffs brought this action against the personal representatives of D., alleging that the collision and the consequent damage were occasioned by the negligence of D., and claiming damages therefor. On the application of the defendants, the Master made an order directing that the writ of summons be amended by striking out the name of C. as a plaintiff and striking out the statement of claim, with leave to the remaining plaintiffs to deliver a new statement of claim:—

*Held*, that it was proper that one action should be brought by the four plaintiffs seeking the same relief on the same grounds against the same defendants.

*Held*, also, that the Negligence Act, 1930, 20 Geo. V. ch. 27, contemplates the giving of relief only between parties to an action; and all the rights of the defendants under the Act against C. could be worked out in this action as originally constituted.

Sections 2, 3, 4, and 6 of the Act considered.

*Seemle*, a defendant cannot compel the addition of a defendant against whom the plaintiffs make no claim.

The order of the Master was set aside.

MOTION on behalf of Allan Donald Cameron, one of the plaintiffs, by way of appeal from the order of the Master dated the 27th January, 1931, by which, on the application of the defendants, it was ordered that the writ of summons be amended by striking out the name of Allan Donald Cameron as a party plaintiff and that the statement of claim be struck out, with leave to the remaining plaintiffs to deliver a new statement of claim.

February 3. The appeal was heard by SEDGEWICK, J., in Chambers.

*C. C. Calvin*, for the plaintiffs.

*T. N. Phelan*, K.C., for the defendants.

February 9. SEDGEWICK, J.:—The action arises by reason of a collision of motor-vehicles upon a highway. The plaintiff Allan Donald Cameron was driving his own car. His co-plaintiffs were passengers with him. The defendants are the personal representatives of William Dibble, the owner and driver of the other car.

The plaintiffs claim that the collision and the consequent damage were due to the negligence of William Dibble.

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On these facts and claims it is proper, and in accordance with practice long approved and encouraged by the Court, that one action should be brought by the four plaintiffs seeking the same relief on the same grounds against the same defendants.

Counsel for the defendants urges that the provisions of the Negligence Act, 1930 (20 Geo. V. ch. 27), make it proper to compel the plaintiff Allan Donald Cameron to bring a separate action against the defendants in order that the defendants may obtain the advantages conferred on them by the Negligence Act, 1930.

The sections of the Act relevant to the facts of this motion are secs. 2, 3, 4, and 6.

Section 2 defines "action" to include counterclaim; "plaintiff" to include a defendant who counterclaims; and "defendant" to include a plaintiff against whom a counterclaim is brought.

Sections 3, 4, and 6 are as follows:—

3. In any action founded upon the fault or negligence of two or more persons the Court shall determine the degree in which each of such persons is at fault or negligent, and where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

4. In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

6. Wherever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as may be deemed just.

The defendants' counsel contends that if Allan Donald Cameron is struck out of the present action the defendants may enforce their rights either by having him added as a defendant under the authority of sec. 6, or by means of a third party notice.

Now, can Allan Donald Cameron if he ceases to be a party plaintiff in this action be added as a party defendant at the instance of the present defendants? I think it extremely doubtful

if a defendant can compel the addition of a defendant against whom the plaintiffs make no claim. The practice would involve the amendment of the writ of summons and of the statement of claim, and service of these must be made on the added defendant. Unless the remaining plaintiffs change their claim and allege negligence against Allan Donald Cameron he would surely be entitled as against them to have the action dismissed as shewing no reasonable cause of action. "Ordinarily a plaintiff is entitled to sue, or omit to sue, whomsoever he pleases, and a defendant cannot, except in special circumstances, apply to add parties:" Holmsted's Judicature Act, 4th ed., p. 559. I cannot see that the defendants can arrive at any satisfactory position by means of sec. 6.

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The defendants' other suggestion is that if Allan Donald Cameron is struck out of this action he may be reached and made liable for contribution and indemnity by a third party notice. I cannot see how third party relief can be given here. The Act does not seem to provide generally for contribution between joint tortfeasors, but only between tort-feasors who are parties to an action. It seems to me that the Act contemplates the giving of relief only between parties to an action. "Defendant" does not ordinarily include a third party, and the Act does not include a third party in its definition of "defendant."

Section 4 may be of use to the defendants if the words "the plaintiff" can be read either as meaning "a plaintiff" or "one of the plaintiffs." It is manifest, however, that, if the section is to be made use of by the defendants in this action, Allan Donald Cameron must be in the action as a plaintiff.

Section 3 is full of difficulty. If this action is founded on the negligence of two or more persons the claims of the defendants in respect of Allan Donald Cameron may be worked out, or if the words "when two or more persons are found liable they shall be jointly and severally liable," etc., are independent of the first sentence in the section, the defendants will have in this action as originally constituted the right to all the relief which they seek as against Allan Donald Cameron. If sec. 3 applies only to an action in which the plaintiffs allege negligence against more than one person, then no amendment that can be made will avail the defendants. In this connection it is interesting to observe that the defendants say that the negligence causing the damage was the negligence of one person only—that is Allan Donald Cameron.

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The defendants have by a sort of alternative defence claimed against Allan Donald Cameron contribution and indemnity under the Negligence Act, 1930. It may be that the language used is sufficient for the purpose. I am assuming that it is. If the defendants so desire, the order disposing of this appeal may give them leave to amend their statement of defence as they may desire in order that any rights they may have under the Negligence Act, 1930, may not be lost by defective pleading.

I am of opinion that all rights of the defendants under the Negligence Act, 1930, against Allan Donald Cameron can be worked out in this action as originally constituted. The appeal of Allan Donald Cameron will therefore be allowed, and the Master's order appealed from will be set aside. The costs here and below to be to Allan Donald Cameron in any event of the action.

I shall, if the defendants desire it, keep open for argument their appeal from the order striking out the third party notice. I may say, however, that I do not see (since Rule 165 provides for a third party notice only when relief is sought against a person not a party to the action) how a third party notice can be allowed against a party not a defendant. Any relief against another party not a defendant may be obtained by counterclaim. The defence in this action contains a claim for such relief. However, as the third party notice appeal was not dealt with on the argument, the parties interested may speak to the matter either by arrangement or on notice.

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[SEDGEWICK, J.]

1931.

RE DOMINION CHOCOLATE CO. LTD.

Feb. 16.

*Company—Winding-up—Claim of Receiver for Debenture-holders—Form of Debentures—Floating Charge—Whether Registration under Bills of Sale and Chattel Mortgage Act Necessary to Give Priority over Ordinary Creditors—Landlord's Right to Distrain—Hydro-Electric Commission's Claim for Rates—Priorities.*

Debentures issued by the company on the 1st March, 1927, were not registered as chattel mortgages under the Bills of Sale and Chattel Mortgage Act. By each debenture the company agreed to pay the principal sum therein mentioned on a certain date, with interest. There was no covering deed or trust mortgage. Each debenture provided security for its payment by creating a first floating charge on all its assets and undertaking both present and future:—

*Held*, in a proceeding for the winding-up of the company, that the words used in creating the charge did not constitute the debentures a "mortgage" within the Bills of Sale and Chattel Mortgage Act,

and that they were a charge on the property of the company in priority to the claims of all other creditors.

*Johnston v. Wade* (1908), 17 O.L.R. 372, followed.

That case is not overruled by *Gordon MacKay & Co. Ltd. v. Capital Trust Corporation and J. A. Larocque Ltd.*, [1927] S.C.R. 374.

*Held*, also, that a landlord's right to distrain is available against goods covered by a chattel mortgage, and the right of the debenture-holders is no higher than that of a chattel mortgagee.

AN appeal on behalf of the receiver for the holders of debentures of the company from the report of the Master, acting as Official Referee, in the winding-up of the Dominion Chocolate Company Limited, pursuant to an order of reference made by MIDDLETON, J.A., dated the 5th May, 1930.

February 4. The appeal was heard by SEDGEWICK, J., in the Weekly Court, Toronto.

*S. H. Robinson*, for the receiver.

*G. A. Binkley*, for the landlord and general creditors.

No one appeared for the Corporation of the City of Toronto and the Toronto Hydro-Electric Commission, although served with notice of motion.

February 16. SEDGEWICK, J.:—By his report dated the 24th November, 1930, the Master found: (1) that debentures of the company to the amount of \$7,100, issued on the 1st March, 1927, have lost their priority over the claims of all other creditors of the company, by reason of failure to register the debentures under the Bills of Sale and Chattel Mortgage Act; and (2) that the lien of the executors and trustees of the Harriet Rodwell Snider estate for the amount of their claim for rent and the lien of the Toronto Hydro-Electric Commission for the amount of its claim against the liquidator and the company have not been impaired by any proceedings taken or had by or on behalf of the debenture-holders.

The registration provisions of the Bills of Sale and Chattel Mortgage Act applicable in this case are the provisions in effect prior to the amending Act of 1927, 17 Geo. V. ch. 41.

The receiver's appeal is from all of these findings.

The writ of summons in the debenture-holders' action is not before me, but the judgment in that action is dated the 1st May, 1930. That judgment orders and adjudges that the debenture-holders are entitled to a lien or charge upon all the assets and undertaking of the company; appoints Edward Guy Clarkson receiver and manager on behalf of the debenture-holders; orders immediate sale; and refers it to the Master to take accounts, etc.

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An order for the winding-up of the company was made on the 5th May, 1930, and on the same day an order appointing Mr. Clarkson provisional liquidator and referring it to the Master to take all necessary proceedings in the winding-up.

By each of the debentures in question the company agrees to pay the principal sum therein mentioned on a certain date, with interest as set forth. There is no covering trust deed or mortgage. Each debenture provides security for its payment in the following words:—

“The company hereby charges with such payment by way of first floating charge all its assets and undertaking both present and future.”

“The floating charge created by this debenture shall in no way hinder or prevent the company from either mortgaging, pledging, or giving security on either, under the provisions of the Bank Act or otherwise, selling, alienating or otherwise disposing of or dealing with the subject-matter of such floating charge in its ordinary course of business or for the purpose of carrying on the same.”

If the words above quoted creating the charge constitute the debentures a “mortgage” within the Bills of Sale and Chattel Mortgage Act, then the debentures under consideration, which were not registered in accordance with that Act, are ineffectual to give their holders any priority against ordinary creditors of the company.

The charging words in the debentures under consideration here are almost precisely the same as the charging words in the debentures which were under consideration in the Court of Appeal for Ontario in the case of *Johnston v. Wade* (1908), 17 O.L.R. 372. In that case the Court of Appeal held that the debentures in question there were not mortgages within the Bills of Sale and Chattel Mortgage Act but were a charge prior to the claims of ordinary creditors.

I am bound by the judgment in *Johnston v. Wade* unless that judgment has been overruled by the judgment of the Supreme Court of Canada in *Gordon MacKay & Co. Ltd. v. Capital Trust Corporation and J. A. Larocque Ltd.*, [1927] S.C.R. 374, which I shall hereinafter describe as the *Larocque* case.

*Johnston v. Wade* is not specifically overruled in the *Larocque* case. It is not discussed or even mentioned in the written reasons of Justices Duff and Newcombe, who expressed the opinions of the majority of the Court. The only references to *Johnston v.*

*Wade* that I have found in which that case has been mentioned in written reasons of Justices of the Supreme Court of Canada are in the dissenting judgment of the Chief Justice of Canada in the *Larocque* case, and in a dissenting judgment of Mignault, J., in *International Typesetting Machine Co. v. Foster* (1920), 60 Can. S.C.R. 416, at p. 425, where *Johnston v. Wade* was mentioned (not with any expression of doubt or disapproval) and distinguished from the case then under consideration. I refer to this judgment only because Mignault, J., expressed his concurrence with the judgment of Duff, J., in the *Larocque* case.

In approaching the question whether or not the *Larocque* case has the effect of overruling *Johnston v. Wade*, it is worth while to recall the words of Lord Halsbury in *Quinn v. Leathem*, [1901] A.C. 495, at p. 506: "Now, before discussing the case of *Allen v. Flood*, [1898] A.C. 1, and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that such a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

In the *Larocque* case the majority of the Supreme Court of Canada held that the instrument then under consideration was a "mortgage" within the meaning of the Bills of Sale and Chattel Mortgage Act, and required registration under it. That instrument was a trust deed securing an issue of bonds. By that trust deed J. A. Larocque Limited "has sold, assigned, transferred, hypothecated, mortgaged, pledged and set over and by these presents doth sell, assign, transfer, hypothecate, mortgage, pledge, set over, and charge unto the trustee its successors and assigns forever,

(1) (Certain real estate) and

(2) All its movable assets for the time being, both present and future, of whatsoever kind and wheresoever situate, in the Province of Ontario, hereinafter referred to as the "floating charge property," to hold in trust to secure certain bonds. Then follows a provision that the "floating charge created by this paragraph 2

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Sedgewick, shall in no way hinder or prevent the company, until the security  
J. hereby constituted shall become enforceable and the trustee shall  
1931. have demanded or become bound to enforce the same either by  
RE dividends out of profits, leasing, mortgaging," etc., the subject-  
DOMINION matters of such "floating charge" in the ordinary course of busi-  
CHOCOLATE ness, etc. The exact words are to be found at p. 376 of [1927]  
Co. LTD. S.C.R.

It seems perfectly clear that by the trust deed the Larocque company passed all its title in all its assets, real and personal, to the trustee. The words of mortgage, pledge, hypothecation, etc., were used only once and were applicable both to lands and movable assets. The only distinction between lands and movables was that the company was permitted in effect to deal with its movables in the ordinary course of business, and until a happening specified, as fully as if the mortgage of the movables had not been made.

The judgment of the Supreme Court of Canada was that the trust deed there considered was a "mortgage" requiring registration under the Bills of Sale and Chattel Mortgage Act, in order to be a valid security to the bondholders against ordinary creditors.

Now, is this judgment so general in its character as to overrule *Johnston v. Wade*, where the debentures conveyed no estate or title in lands or goods to any person whomsoever? I cannot say that the judgments of Duff, J., and Newcombe, J., have so far-reaching an effect. Duff, J., begins his judgment as follows:—

"This appeal raises the question whether or not a certain instrument falls within the category of instruments dealt with by chapter 135 of the Revised Statutes of Ontario for 1914 known as the Bills of Sale and Chattel Mortgage Act. The immediate practical point is whether or not the requirements of the statute apply in such a way as to make registration of the instrument obligatory."

The fact that the instrument is intended, with respect to certain property, to operate as a floating charge does not make it not a mortgage if in its form and language it is a mortgage. I admit that there is language on p. 385 which, considered alone, would or could be read as against the validity of the debenture considered in *Johnston v. Wade*. But I come back to the language of Lord Halsbury quoted above, and I read the judgment of Duff, J., "as applicable to the particular facts," and I am not entitled to assume that the generality of the expressions which are found there are intended to be expositions of the whole law, but I must assume (in

the absence of more particular language) that they are governed and qualified by the particular facts of the case in which such expressions are to be found. The same considerations apply to the other majority judgment in the *Larocque* case, that of Newcombe, J., who says (p. 386) :—

“The question is whether the trust deed . . . is a mortgage or conveyance intended to operate as a mortgage within the meaning of the Bills of Sale and Chattel Mortgage Act . . . and it depends on the intent of the instrument.”

Then the learned Judge goes on to point out that the mortgage of movables is only “floating” to a limited extent, i.e., to dispositions in the ordinary course of business, and again, on p. 388, “The instrument is in form and expression, to all intents and purposes, a mortgage, except that until the mortgagee takes possession upon default the mortgagor retains a limited power of disposition.”

My conclusion is, therefore, that the judgment in *Johnston v. Wade* is still binding on me and that the appeal of the debenture-holders on the point must be allowed. The order in respect of this branch of the appeal will be that paragraph numbered 2 of the Official Referee’s report will be amended by striking out the words following after the word “statute” in the fourth line from the last of the said paragraph and substituting therefor the following, “and the said debentures form a charge on the property of Dominion Chocolate Company Limited in priority to the claims of all other creditors of Dominion Chocolate Company Limited.”

The appellant cannot succeed on the second branch of his appeal. The landlord’s right to distrain is available against goods covered by a chattel mortgage given by the tenant and the right of the debenture-holders is no higher than that of chattel mortgagee.

The appellant, having succeeded in the substantial part of this appeal, is entitled to his costs here and below out of the estate.

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FRED. T. BROOKS LTD. v. CLAUDE NEON GENERAL  
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Feb. 19.

*Company—Agreement by another Company for Purchase of whole Outstanding Stock—Authority of Director Executing Agreement on Behalf of Purchasing Company—Failure to Shew—Provision for Execution of more Formal Document—Delivery of Certified Auditor's Statement and Declaration as to Outstanding Contracts—Dismissal of Action as against Purchasing Company—Damages for Breach of Undertaking of Director.*

An agreement made between the B. company, of the first part, the C. company, of the second part, and certain other companies and individuals, of the third and fourth parts, recited (among other things) that the C. company carried on business as a general outdoor advertising agent in H.; that the C. company had agreed to purchase all the outstanding shares of the stock of the B. company; that the parties of the third part were selling agents of outdoor advertising; and that the parties of the fourth part were active individuals in the several organisations of the parties of the third part. The agreement then provided that the C. company agrees to purchase from the B. company and the parties of the third and fourth parts all the outstanding shares of the stock of the B. company for \$150,000—\$62,500 payable in cash on the delivery of the shares and \$87,500 by the delivery of preferred stock of the C. company. The agreement also provided that a certified auditor's statement of the affairs of the B. company should be furnished and a declaration as to contracts outstanding. The agreement contained a statement that it was signed by B. as president of the B. company, by R. on behalf of the C. company, followed by a similar statement in regard to the persons signing on behalf of the other companies, and subsequently these words, "do respectively undertake to get the proper authorisation from their respective companies for the execution hereof and the execution of a more formal agreement embodying the terms hereof and of the parties of the fourth part as individuals." The plaintiffs, who were the B. company and other companies and individuals, alleging that they had duly performed all the terms of the agreement, sought to recover from the defendants, who were the C. company, R., who had signed the agreement on behalf of the C. company, and A., who became the managing director of the C. company, \$62,500 and 8,750 shares of the C. company, or \$87,500 in cash; and, in the alternative, asked for damages against R. and A. The defendants alleged that the agreement was tentative only and subject to the approval of the C. company, and that it never was approved; that no one had authority on behalf of the C. company to enter into the agreement, and that it never was authorised or ratified; they also denied that the defendants A. and R., or either of them, held any office in the defendant company at the time of the execution of the agreement; that all parties to the agreement knew of the want of authority, and that it appeared on the face of the agreement. They further alleged that the agreement contemplated the preparation of a more formal agreement, but such an agreement was never submitted or approved; and that the provisions as to the certified statement and the declaration were not complied with:—

*Held*, upon the evidence, that the certified statement was delivered and that it was not objected to or criticised; and that the delivery

of the declaration was excused by the repudiation of the agreement by the C. company.

2. That the "more formal agreement" was to contain and to contain only the same terms as were stated in the agreement executed; and that, if the C. company was bound at all by the agreement executed, the mere provision that a more formal agreement was to be executed did not make it the less binding.

*Rossiter v. Miller* (1878), 3 App. Cas. 1124, followed.

3. That, although R. (a director) represented himself as having authority to bind the C. company, he had no actual or express authority to do so, and the plaintiffs were not entitled to rely upon some implied authority or some holding out by that company of R. as a person with whom such an agreement might safely be entered into—the directors as a body were to carry on the business of the company, and had no power to delegate their functions to R.
- McKnight Construction Co. v. Vansickler* (1915), 51 Can. S.C.R. 374, distinguished.

4. That there was something so out of the ordinary in one company undertaking to purchase the entire outstanding stock of another as to put the plaintiffs upon inquiry to ascertain whether the person or persons making the contract had authority in fact to make it.

*Houghton v. Nothard Lowe and Wills Ltd.*, [1927] 1 K.B. 246, applied.

5. That R. was liable to the plaintiffs in damages for breach of his undertaking to get a proper authorisation from the C. company.

THE plaintiffs, Fred. T. Brooks Ltd. and others, alleging that they had duly performed all the terms of a certain agreement, sought to recover from the defendants, Claude Neon General Advertising Ltd. and others, \$62,500 and 8,750 shares of the preferred stock of the defendant company, or, in lieu of the stock, an additional sum of \$87,500 in cash. They also claimed, in the alternative, damages against the defendants Asch and Robertson.

The action was tried before GARROW, J., without a jury, at a Toronto sittings.

*R. S. Robertson*, K.C., for the plaintiffs.

*A. C. McMaster*, K.C., for the defendant company and the defendant Asch.

*D. L. McCarthy*, K.C., for the defendant Robertson.

February 19. GARROW, J.:—The plaintiff companies and the individual plaintiffs among them own or control all of the issued capital stock of Fred. T. Brooks Ltd., and all are interested and engaged in the outdoor advertising business in one form or another, as is also the defendant company, which was incorporated under the Companies Act of Canada in or about the month of December, 1929. The defendant Asch is now the managing director of the defendant company, having been elected to that office on the 20th February, 1930, and the defendant Robertson is now a director and vice-president of the company, he having been elected

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Garrow, J. to those positions on the 1st April, 1930. The defendant com-  
 1931. pany, early in that year, had acquired the shares of Asch Ltd., of  
 which the defendant Asch had been apparently the moving spirit,  
 FRED T. and had also, late in the year 1929, acquired the E. L. Ruddy Com-  
 BROOKS LTD. v. pany Ltd., of which Robertson had been the vice-president and  
 CLAUDE general manager.  
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At the date of the agreement hereinafter referred to, the defendant company, although organised, was in its infancy and was being operated by a board of so called "dummy" directors made up largely of members of the staff of its solicitors, under the control, no doubt, of Asch, Godin, Smith, and others, who ultimately, as was well understood, were to assume control. The purchase of the Asch company shares and of the Ruddy company shares took place while this board was in office, and negotiations for the purchase of shares in other companies were entered upon but fell through during the same *régime*, including tentative negotiations for the purchase of the plaintiff company, and these negotiations were largely carried on by Asch, Godin, and Robertson.

The defendant company is empowered, among other objects, to purchase, take, or otherwise acquire by original subscription or otherwise, and to hold, sell, or otherwise dispose of, shares, stock, etc., in any other company or corporation, and by-law 16 provides that the directors of the company may from time to time purchase . . . or otherwise acquire . . . sell, exchange, or otherwise dispose of stocks, shares, bonds, etc., for such consideration and upon such terms and conditions as they may deem advisable, and the same by-law provides that the directors of the company may administer its affairs in all things, and may make or cause to be made for the company any description of contract which the company may by by-law enter into, and generally may exercise all or any of the rights or powers which the company itself may exercise under its charter and the laws governing it.

The present litigation arises out of an agreement (exhibit 1), dated the 15th February, 1930, between Fred. T. Brooks Ltd., of the first part, Claude Neon General Advertising Ltd., of the second part, Gould-Baird Ltd., Dominion Signs Ltd., Twin Cities Signs Ltd., C. E. Marley, and Kent Dickinson, of the third part, and Gould, Marley, Spence, Hill, and Dickinson, of the fourth part. It recites, among other things, that the party of the first part carries on business as a general outdoor advertising agent in the city of Hamilton; that the party of the second part has

agreed to purchase all the outstanding shares of the party of the first part; that the parties of the third part are selling agents of outdoor advertising; and the parties of the fourth part are active individuals in the several organisations of the parties of the third part. It then provides that the party of the second part agrees to purchase from the party of the first part and the parties of the third and fourth parts all the outstanding shares of the capital stock of the Brooks company, in consideration of the sum of \$150,000, \$62,500 payable in cash on the delivery of the shares and \$87,500 to be paid by the delivery of preferred stock of the party of the second part.

The agreement further provides that a certified auditor's statement of the affairs of the Brooks company will be furnished at once and a declaration as to all long term and short term contracts outstanding.

The parties of the third part agree not to sell or offer to sell any signs of the Neon type other than those now manufactured or which may hereafter be manufactured or sold by the party of the second part, and the party of the second part agrees that the parties of the third part shall have the sole right of selling signs of the Neon type only in the respective territories in which they carry on business—this clause to be in force for 10 years. And the parties of the fourth part agree not to be engaged in the sale of any advertisement of the Neon type other than for the respective companies they are now associated with, among the group of the party of the third part, for a similar period of 10 years.

Then follows a portion of the agreement which is responsible largely for the dispute involved in this litigation.

"These presents are signed by the following: Fred. T. Brooks on behalf of the party of the first part, as president thereof: J. R. Robertson on behalf of the party of the second part," ("as vice-president thereof" stricken out), followed by a similar statement in regard to the persons signing on behalf of the other companies, and subsequently these words, "do respectively undertake to get the proper authorisation from their respective companies for the execution hereof and the execution of a more formal agreement embodying the terms hereof and of the parties of the fourth part as individuals."

Then follow the signatures of the individual signers over the typewritten name of the company which each represents.

The plaintiffs claim to have duly performed all the terms of

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Garrow, J. this agreement, and seek to recover from the defendants the sum of \$62,500 and 8,750 shares of the preferred stock of the defendant company, or, failing delivery of the said shares, an additional sum in cash of \$87,500. By amendment allowed at the trial, they also ask for damages, in the alternative, against the defendants Robertson and Asch.

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The defendants allege that the agreement (exhibit 1) was tentative only and subject to the approval of the defendant company, and that it never was approved. They deny that any one had authority on behalf of the defendant company to enter into the agreement and allege that it was never authorised or ratified. They also deny that the defendants Asch and Robertson, or either of them, held any office either as vice-president, general manager, or otherwise in the defendant company at the time of the execution of the agreement, and they allege that all parties to the agreement well knew that the defendants Asch and Robertson had no authority to bind the company, and that this fact appears on the face of the agreement. They further allege that the agreement contemplates the preparation of a further, fuller, and more formal agreement, and was subject to the same being acceptable to the defendant company, and that such further and more formal agreement was never submitted or approved. They further assert that the provisions of the agreement as to the furnishing of a certified auditor's statement and a declaration as to long term and short term contracts were not complied with; that these statements were to be furnished to enable the defendant company to ascertain the financial position of the plaintiff company; and that the defendant company was not to be bound to proceed further unless the said statements were satisfactory.

Much evidence was taken at the trial, and, as the questions involved turn largely upon the interviews held before and at the time the agreement was signed, it is necessary to deal somewhat at length with the evidence.

E. C. Gould, president of Gould-Baird Company, was the first witness called on behalf of the plaintiffs. He stated that in January, 1930, he was called on the telephone by the defendant Robertson, whom he knew as the sales-manager of the E. L. Ruddy Company. Robertson wanted him to go to Montreal to discuss selling out to the Neon company, and Marley and Gould went with Robertson to Montreal for that purpose and there met Godin and Asch. He stated that they were speaking on behalf of the Neon

company. A certain proposal was made by them which was not attractive to Gould and Marley, and the matter dropped at that time.

Later Gould got in touch with Robertson and told him that the price for the Brooks company shares was \$200,000 cash. Robertson stated that that was too much money. Subsequently, owing to a telephone call from Marley, Gould came to Toronto to attend a meeting arranged for the 12th February. Robertson, Asch, Kester, of the Winnipeg Neon company, Brooks, Marley, Spence, and Dickinson were present. Asch and Robertson were the principal speakers, and it was suggested that the plaintiffs join hands with the Neon company. At this meeting Brooks and Marley spoke of \$150,000 as the price, and this was agreed to, \$75,000 to be paid in cash and \$75,000 in 10 per cent. preferred shares. Gould said that, so far as he was concerned, the price would have to be accepted within 48 hours, and Asch said that that would be sufficient time. Within the 48 hours, and on the 14th February, Robertson called Gould on the telephone and said to him, "The deal is on," but suggested that instead of \$75,000 cash they accept \$50,000 in cash and increase the preferred shares accordingly. Gould, after some hesitation, agreed to make it \$62,500 in cash and \$87,500 in shares. Robertson said, "Very well, bring down your solicitor," and asked Gould to notify all parties, which he did; and on the following Saturday, at the Royal York Hotel in Toronto, all parties met. There were present at this meeting, Robertson, Sutton, Kester, Pegg, Marley, Dickinson, Brooks, Spence, Hill, and Gould. Gould says that Robertson took command of the meeting and outlined the proposition—the only difference between them at the time being as to the amount of cash to be paid. Robertson said that before he could agree to this modification he would have to get authority from Montreal. He left the room and apparently telephoned and came back and said he had authority. Then Mr. Henderson, solicitor for the plaintiffs, arrived, he having been notified beforehand to make himself available. Robertson, so Gould says, explained the whole situation to Henderson, and the latter asked who was their solicitor and was told that Mr. Bullen would act. Henderson asked if the necessary authority was in the room for all the companies represented, and Robertson said that he had the necessary authority for the Neon company. Then Mr. Bullen arrived and Robertson again explained matters to him, and Robertson, Henderson, and Bullen went into an adjoining

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Garrow, J. room to prepare the agreement, which was afterwards signed by  
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FRED T. In a week's time, Gould says, he telephoned Robertson and  
BROOKS LTD. asked why the cheque for \$62,500 had not been received, and was  
v. told by Robertson that one or two of the directors were out of  
CLAUDE town, but that the matter would be attended to a few days later.  
NEON He inquired again and was given the same answer and a third time  
GENERAL ADVERTISING LTD. with the same result.

Gould speaks of a later meeting, held on the 18th, at which Marley, Dickinson, Spence, Robertson, and Sutton were all present, and at which he says a discussion took place as to territories, commission, prices, etc., with a view to getting under way a selling campaign, and all on the clear assumption, so he says, that the agreement already executed was to be carried out.

A later meeting, after litigation had been threatened, took place in May, 1930. This meeting was stated by Mr. Henderson, who attended, to be without prejudice, and much of what took place at that meeting was rejected as evidence on that account. The plaintiffs were at that time asserting, as they had been throughout, that the agreement already executed was binding and they did not propose to prejudice that position by subsequent negotiations, but at the close of that meeting, Gould says, Asch gave him to understand that the matter would be carried out within 48 hours.

The evidence of Marley, one of the plaintiffs, is to the effect that he was invited by Robertson to come to Montreal in January, and that Robertson had told him that he had been instrumental in putting through a deal for the Neon company, and that the purpose of the meeting in Montreal was to discuss the purchase by the Neon company of the Marley-Gould interests. Nothing came of this, and the only importance of the evidence, of course, is to indicate that Robertson and Asch were being put forward by the company as persons authorised to negotiate with others for the purchase of shares of other companies. He then goes on to speak of the meetings in February and states that Gould was authorised to quote a price; that he, Marley, spoke to Robertson on the telephone on a Friday, and mentioned the possibility of a sale; and that Robertson said, if it was a fair price, they would consider the purchase, and a meeting was arranged for the following Monday. Gould was not at this meeting. Robertson said at that meeting that if a fair price was set there would no doubt follow a purchase by the defendant company, and finally Brooks and Marley agreed

to sell for \$150,000 if the rest of the shareholders would agree to it, half cash and half stock in the Neon company. This was satisfactory. Robertson said he would call Asch, and he did call him on the telephone and said to him, "Joe, I have got this deal fixed. Will you come up and bring \$75,000 with you?" And Robertson then said that Asch had agreed to come up. They met again on Wednesday at the Royal York. At this meeting Asch said that all that remained to do was to get authority from Montreal. Gould said that it was necessary that the matter be closed in 48 hours, and Asch said that they would be advised within that time.

Marley later, with the others, attended the meeting of the 15th. At that meeting Robertson said that everything was in order except that the defendant company did not want to pay more than \$50,000 cash, and it was finally agreed that the cash payment should be \$62,500. Robertson then stated that he would go to the telephone and get authority for this modification, which he did. Henderson then came in, and Robertson told Henderson that the whole matter was decided and explained the details. Henderson asked all parties if they had authority to sign, and Robertson said he had authority. He said, at a later stage, that, while he was or expected to be the vice-president of the company, he did not wish to be the first to announce that fact, and it was for this reason that the words "vice-president," referring to him as vice-president, were subsequently stricken out. Robertson had already told Marley that he was a director of the company. Marley also attended the meeting of the 6th May, and at the end of that discussion, he says, Asch promised to have the formal document prepared and signed embodying the contract already signed. Robertson was at this meeting as well.

Then the evidence of Brooks, who was the managing director of the plaintiff company, was to the effect that he attended the meeting of the 10th February with Marley and Robertson, and was asked by Robertson if he was interested in selling. Robertson said that on this occasion he was representing the defendant company, and at that meeting Robertson telephoned Asch and said, "I have got that deal all fixed," and suggested his coming up to Toronto with \$75,000. This witness also was at the meeting of the 15th at the Royal York, at which, he says, it was finally agreed to make the cash payment \$62,500. Robertson then said that he must get authority from Montreal to make that change. He left the room and came back and said that he had obtained the neces-

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sary authority. About this time Henderson came into the room and matters were explained to him. Henderson asked whether all parties had authority, and he particularly asked Robertson if he had, and was told by the latter that he had authority.

Then the evidence of Mr. Henderson is also important. He arrived at the meeting of the 15th February about noon, having come there under instructions from the plaintiff companies. At this time Brooks, Gould, Marley, Spence, Hill, Dickinson, Robertson, and others were present. Robertson told Henderson that the parties had arrived at an agreement for the purchase of the Brooks company shares at \$150,000; that the various companies had agreed that they would sell only Neon signs for 10 years, and that they would have mutual exclusive rights; that the price was to be paid \$62,500 in cash and the balance in preferred shares of the Neon company. Henderson then inquired as to the financial structure of the defendant company and was told of certain outstanding bonds. Robertson also told him, so he says, that he, Robertson, was there representing the Neon Advertising company, the purchaser; that the object of the meeting was to have a contract made to cover the purchase. Henderson said, "What have we here to enable the contract to be made?" He found that the entire capital stock of the Brooks company was present and represented and that its president and manager were there; that the large majority of the Gould stock was there and its executive officers; and he found substantially the same as to the other companies. He then asked Robertson for his authority, and Robertson said he was a director and vice-president of the defendant company and had authority to make the contract on behalf of the defendant company; that the only point lacking was as to the cash payment; and that he had just called Montreal and had that modification confirmed. He also said that he had been instructed that it would be necessary to bind the selling organisations for 10 years instead of 5, as originally suggested, and that that had been agreed to. He also said that there had been a meeting on the Wednesday preceding, at which Asch had been present, and that Asch had gone back to Montreal to get necessary authority, and that he, Asch, had advised Robertson that authority had been given. Shortly after this, Mr. Bullen came in and Robertson repeated to Bullen, so Henderson says, what had been agreed to, and Bullen, Robertson, and Henderson then went into the adjoining room and the agreement was prepared. When it came to be signed, Robertson said

that, while it had been intimated to him that he was vice-president or to be vice-president, he wished the announcement to come from Montreal, and not from him, and therefore the words were stricken out. Henderson says that on this occasion he handed an auditor's certified statement to Bullen.

Exhibit 2 indicates that the selling companies passed resolutions authorising the making of the agreement. Henderson was at the meeting of the 6th May. At the conclusion of the discussion, Asch said that he would carry out the contract, that the Neon company was not paying \$150,000 for the Brooks company itself, but that its main object was to tie up the selling organisations for the 10 years, and he promised to send forward the formal document.

Other evidence much to the same effect was given by Dickinson, Spence, and others.

Robertson, for the defence, admits that Asch, Godin, and he were representing the Neon interests at the ineffective January meeting, but says that when this first meeting came to nothing he had no instructions to continue. He also said that the first discussion that took place in regard to his final position with the new company was in April, 1930, when he was appointed vice-president. Then, speaking of the February meeting, he says that he got a telephone message from Marley on Sunday evening, the 9th February, at his house; that Marley suggested to him the acquisition of the Brooks company. He was told that Gould had been delegated to negotiate but nothing had come of it. Marley said he would like to bring Brooks down and talk it over, and this was arranged and on the 10th February he was telephoned to meet Brooks and Marley at the Royal York. He says that Marley asked him on that occasion if he had the power to act for Asch and his associates and that he told him he had no power or authority to act. He was then asked with whom he would have to get in touch, and Robertson said, with Asch—that he was his contact with the Neon interests. It was suggested that he 'phone Asch, which he did, and told him what had taken place, told him the price, and suggested, as he says, jocularly, that he put \$75,000 in his pocket and come up to Toronto, and Asch promised to come. It was arranged then to meet on the following Wednesday, and at that meeting it was stated that an answer must be given in 48 hours, and Asch, who had come up as promised, undertook to let the sellers know what the result would be within that time. Robert-

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son then had a conversation with Asch from Montreal; and, as a result of that, telephoned Gould and told him that Asch had said that the price was satisfactory, but the terms would have to be altered, and the meeting of the 15th was arranged. Robertson said at that meeting that he had heard from Montreal that the terms of payment would have to be altered, and it was finally suggested that \$62,500 should be the cash payment. He said he would telephone to Montreal, and he did so and got Asch on the telephone, and returned to the room and stated that they were agreeable as to the cash payment but would require a 10-year clause in the agreement. This caused a good deal of discussion, but was finally agreed to. Mr. Henderson then arrived; and Robertson, being asked to explain the situation, did so. Mr. Bullen was telephoned for and came, and Robertson again went over the story. Robertson says that he said on this occasion that he did not know how a definite agreement could be arrived at, and that it was suggested that perhaps there should be two agreements, the first a tentative one and subsequently a formal one. When the agreement (exhibit 1) was prepared, Robertson says he took exception to it, stated he was not vice-president or a director and did not know whether the company was even formed. Prior to this, Henderson had said something about whether the individual persons had authority. "I think I said I had not but was going to get it." Henderson, he says, "asked me what my authority was." I told him I had no authority, and he says that throughout he made it clear that what the parties were discussing was subject to the approval of Montreal. He admits that later he gave as an excuse for the agreement not being carried out that the directors or some of them were out of town, although it appears there was always a quorum of the board available. As to the meeting of the 6th May he says that at the conclusion of that meeting he said, "Is this a deal?" and Asch said, "This is not a deal—I have people in Montreal I must talk to." He also stated that he was instructed by Asch over the telephone or otherwise to take any commitment from the vendors he could get, but that he was not to commit himself on behalf of the company.

Mr. Bullen said he was informed, when called to the meeting on behalf of the defendants, that the defendant company was taking over the Brooks company of Hamilton, and that he and Henderson and Robertson prepared the agreement in the adjoining room. After it had been prepared, Robertson said he was not

vice-president, that the defendant company was only in process of formation, and that he did not know who the officers were, and Bullen struck out the words describing Robertson as vice-president. He said that either he or Henderson raised the question of authority, and Robertson said, "My company is not even formed yet."

On cross-examination he said he believed from what he was told that the parties' minds had met, that his instructions were to "tie up the personnel," and this he thought he had done, and that he would not have drawn the agreement if he had not believed the company (Neon company) was in existence.

The witness Pegg said that Robertson said on the 15th, "I am not vice-president, I have no authority," and that the matter must be referred to Montreal. He also added on cross-examination that, when Robertson denied his authority, Gould said, "This agreement is all based on faith."

The defendant Asch said he was elected a director of the defendant company on the 20th February, 1930, and Robertson on the 1st April; and that the first and only time the defendant company dealt with this matter, as appears by the minutes, was on the occasion of the 1st April.

Speaking of the telephone conversation between Robertson and himself, he said that Robertson stated he thought he could make a deal. Asch said, "Very well, get a commitment from them" (the plaintiffs) "which I can place before the board, but do not bind us." The next thing he heard was when Robertson sent him a copy of the agreement. At this time the defendant company's board was not constituted, and the matter was never laid before the dummy directors.

As to the meeting of the 6th May, he states that he promised to go back to Montreal and recommend something to the board, but he denies that he said at the conclusion of that meeting anything to indicate that the bargain was arranged or that it was a deal. On the contrary, he says that he stated plainly that there was as yet no deal and that all he could do was to recommend one.

On cross-examination this witness stated that he and Godin had instructed the incorporation of the defendant company, and admitted that the latter had, as early as the 16th January, entered into important agreements through its dummy directorate, who were simply following the instructions of himself and Godin. Before the company was incorporated, he had spoken to Robertson about coming in and about his subsequently acting as vice-presi-

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Garrow, J. 1931. dent, he himself to be manager. He got his own shares through the action of the dummy directorate.

FRED T. At the January meeting it was, he says, on behalf of the de-  
BROOKS LTD. fendant company that he was negotiating.

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CLAUDE He took up with Godin and Julius Smith, some time before the  
NEON 15th February, the question of the Brooks company being acquired.  
GENERAL These two approved of the idea, and left it to him to get a proposi-  
ADVERTISING tion in writing and to carry on negotiations, and this, he says, is  
LTD. what he told Robertson. He states that he did not know Robertson was to meet the plaintiffs on the 15th, or that they had met when Robertson telephoned on that date. He told Robertson on the telephone to secure something binding on the plaintiffs, but not on the defendants. He says he remonstrated with Robertson for acting without authority, but did not communicate with the plaintiffs repudiating Robertson's action. He admits that there was at all times available a majority of the dummy directors before whom the matter could have been brought.

Sutton says that at one stage of the meeting of the 15th February he heard Robertson say he had no authority. He admits he was taking no part and was not himself concerned.

Henderson, on being recalled in reply, denied that Robertson said he had no authority. On the contrary, he assured Henderson that he had. As to the meeting of the 6th May, Asch's promise was to carry out the agreement, the sole exception being as to the manner in which the consideration was stated in exhibit 1. At this meeting Gould did not say, "Is this a deal?"

Gould and Marley (recalled) corroborate what Henderson says in reply.

On this most conflicting testimony I am inclined to give credence to the evidence of Mr. Henderson, and those who agree with him, to the effect that Robertson stated plainly that he had authority to bind the defendant company, at least to the extent to which it was intended by the document itself that that company should be bound. No doubt he said that he was not yet vice-president, but I am at a loss to understand, if it was intended to be merely an offer to sell, as the defendants in effect contend, why the agreement was drawn as it was. In this conclusion I am not to be taken as discrediting the evidence of Mr. Bullen in the slightest. As I recall his evidence, he nowhere said that Robertson said he had no authority, but merely that he stated that the company was in process of formation, which was not, to say the least, an accurate

statement of the fact. And Mr. Bullen did say that he would not have drawn the agreement had he not believed the company was in existence, as of course it was.

Subsequent to the signing of exhibit 1, certain correspondence took place which is filed as exhibits 4 to 11. Robertson, for instance, writes to Brooks, on the 22nd February, that "the final closing of the deal has not been effected yet," and gives as a reason the absence of some of the directors. Brooks replies that "the final closing of the deal is not worrying me one half as much as getting down to a selling basis," and he refers at length to certain details of the business to be subsequently carried on under the new arrangement.

Although Asch remonstrated with Robertson almost immediately after the 15th February (why, if the company was not bound?), yet it was not until after Mr. Henderson had written on the 28th March to Godin that it was clearly stated by the latter on behalf of the defendant company that it was not to be considered as bound, and that, so far, nothing but negotiations had taken place, which he, Godin, was quite willing to continue.

On the 1st April, the only entry in the minute-book of the defendant company in regard to this matter was made to the effect that "the situation arising out of the Brooks, Marley, Gould proposed deal was discussed, and it was decided to leave the matter in the hands of Mr. Asch and Mr. Robertson and have them make their recommendation to the directors as to the disposal of this matter."

I find it difficult to believe, in the face of this resolution, and knowing as they did that the matter had reached the stage of threatened litigation, that Robertson and Asch would or did at the meeting of the 6th May ratify the agreement already executed. The parties were almost at arms' length then, the plaintiffs attended and took part "without prejudice" to their rights: Asch and Robertson had no power to do more than recommend; and, whatever actually was said, I find that it did not amount to a ratification of what had already taken place.

The question then is, what rights arise under the document exhibit 1? It is said by the defendants that, even if the defendant company is bound to any extent by the signature of Robertson, the agreement on its face was only tentative, that it was not to be finally binding until the certified balance-sheet was not only sub-

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FRED T. BROOKS LTD. v. CLAUDE NEON GENERAL ADVERTISING LTD. I find as a fact that the certified statement was submitted, and there is not a word in the correspondence to indicate any objection to or criticism of it. It is contended that the delivery of the declaration was excused by the repudiation of the agreement by the company.

It is also said that the agreement is not to be held binding because it provides by its very terms for the execution of a more formal document. But that more formal document was to contain, and to contain only, as I would hold, the same terms as are to be found in exhibit 1. That being so, I think I should be justified in holding, on the authority of such cases as *Rossiter v. Miller* (1878), 3 App. Cas. 1124, that, if the company is bound at all by exhibit 1, the mere provision that a more formal agreement embodying the same terms was to be executed does not make it any the less binding.

And, further, it is claimed that the fact that the individuals (including Robertson) who signed the agreement undertook to get the proper authorisation from their respective companies "for the execution hereof," as well as for the execution of a subsequent and more formal agreement, makes it obvious that such authority was lacking at the moment. The plaintiff companies, immediately after the 15th February, formally passed resolutions to this effect, which were ultimately tendered. The defendant company did not.

Counsel for the plaintiffs explains the language quoted by pointing to a difference in meaning between "authority" and "authorisation" and by suggesting that what was lacking on the part of Robertson was not authority to bind the company but evidence of it in the form of a resolution.

Although I find that Robertson represented himself as having authority to bind the defendant company, it is clear that he had no actual or express authority so to do; and the important question to be decided, it appears to me, is whether, under all the circumstances, the plaintiffs are entitled to rely upon some implied authority or some holding out on the part of the company of Robertson as a person with whom such an agreement as the present might safely be entered into.

Counsel for the plaintiffs refers to and relies upon the case of *McKnight Construction Co. v. Vansickler* (1915), 51 Can. S.C.R. 374, in which it was held that an industrial company has power to

sell its business premises in order to secure others more suitable, and a contract for such sale may be valid although not under seal, and where the contract is executed by an officer of the company (in this case the secretary) to whom the necessary authority might be given, the other party is not required to ascertain whether proper steps have been taken to clothe him with such authority: it is sufficient that he is the apparent agent of the company to transact business of the kind, and that the power which he purports to exercise is such as under the constitution of the company he might possess.

But I think that case is distinguishable from the present. There the purchasers from the company were dealing with one known to be an officer and one to whom under the by-laws of the company there was power to delegate the functions of the directorate, and it was held they were entitled to assume that such power had been exercised. Here the plaintiffs were dealing with one who was not a director or officer, although he expected to be vice-president, and one to whom, even if he had been at this time an officer or director, there was no power to delegate. So far as I have examined the by-laws, they provide apparently for the directorate as a whole carrying on the business of the company, and I find no express power to delegate to any one of their number or to an officer.

Undoubtedly, where the directors of a company have authority to delegate to one of their number, or to a managing director, the company is bound by the acts of one who within the knowledge of the directors enters into transactions with third parties on the footing of the existence of such delegated authority, even though it has not in fact been so delegated to him: *Biggerstaff v. Rowatt's Wharf Ltd.*, [1896] 2 Ch. 93. But even in such a case the person dealing with the supposed agent cannot rely upon the supposed exercise of such power if he did not know of the existence of the power at the time he made the contract: *Houghton v. Nothard Lowe and Wills Ltd.*, [1927] 1 K.B. 246. The doctrine of constructive notice, it was said in that case, is not a positive doctrine but a negative one, operating adversely to a person who neglects to inquire: it does not entitle such a person to claim for his own advantage to be treated as having knowledge of facts which inquiry would have disclosed.

There was no inquiry beyond what has already been referred to, but if there had been it would have failed to disclose any power

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FRED T. And, further, I am inclined to agree with the argument of  
 BROOKS LTD. counsel for the defendant company, an argument given effect to  
 v. in the case last cited, that there was something so out of the  
 CLAUDE ordinary in one company undertaking to purchase the entire out-  
 NEON standing stock of another as to put the plaintiffs "upon inquiry  
 GENERAL to ascertain whether the person or persons making the contract had  
 ADVERTISING LTD. any authority in fact to make it." Lord Justice Sargent, at p.  
 267, said: "I know of no case in which an ordinary director,  
 acting without authority in fact, has been held capable of binding  
 a company by a contract with a third party, merely on the ground  
 that that third party assumed that the director had been given  
 authority by the board to make the contract." And Robertson's  
 position certainly cannot be placed higher than that of a director.

Nor do I think the plaintiffs are entitled to rely upon the in-  
 effective negotiations held in January as a holding out by the  
 defendant company of Robertson or Asch, or both together, as  
 being persons entitled to enter into the contract of the 15th Febru-  
 ary in such a way as to bind the company. True, they said they  
 were negotiating on behalf of the company, but their saying so did  
 not make it so, and there is no evidence whatever that they gave  
 Gould and Marley to understand that, if the negotiations had been  
 successful, they or either of them would have assumed to bind the  
 company by a contract over their signatures, or that the company  
 would have recognised such a contract if they had.

Nor are the plaintiffs, I think, on the principle already referred  
 to, entitled to rely for their support upon the fact that other con-  
 tracts had been negotiated by these same persons, the plaintiffs  
 being entirely ignorant of these facts at the time.

For these reasons, I find that the action fails against the com-  
 pany. I should not have been sorry to come to a different con-  
 clusion. In my opinion, Robertson was quite willing to give an  
 appearance of substance to a contract which had none, and the  
 company, or those in actual control of it, was not adverse to this  
 being done. One would have supposed that, since Asch reprimanded  
 Robertson for having gone as far as he did, he would at  
 once have notified the plaintiffs that the company was not bound.  
 He did not do so however. They were in fact, as I see it, doing  
 their best to tie up business rivals while remaining free themselves;  
 and, while that may be quite permissible where it is done with open

eyes, it has the appearance, to my mind, under the circumstances of this case, of not being entirely straightforward. This, I say again, is no reflection upon Mr. Bullen, but it is sufficient, in my opinion, to deprive the defendant company of its costs.

As to the individual defendants Robertson and Asch, the action is dismissed against the latter also without costs. Counsel for Robertson contends, of course, that, if the company is bound, there can be no liability on his client's part; and that, even if the company be not bound, Robertson would be liable only if and when the certified statement of the affairs of the company and the declaration as to the long and short term contracts had been submitted to the company and were found to be unobjectionable. I do not agree with this. The certified statement was, as I find, duly furnished. Henderson tendered the Brooks company's certificates and they were refused. No complaint was at any time made as to the insufficiency of the statement or the failure to furnish the declaration; and, after repudiation by the defendant company, the plaintiffs were not bound to do anything further. What Robertson undertook, in the language of exhibit 1, was "to get the proper authorisation from" the Neon company "for the execution hereof and the execution of a more formal agreement embodying the terms hereof." This, on his own admission, he never had and never obtained, and for the breach of that undertaking, or of his warranty of authority to bind the company, he is, I think, liable to the plaintiffs in damages. I shall not assess these damages, but will direct a reference to the Master at Toronto for that purpose. The plaintiffs are entitled to their costs against Robertson down to and including the trial. Further directions and costs reserved until the Master shall have made his report.

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[LOGIE, J.]

MACPHERSON V. LONDON LOAN ASSETS LTD. AND ROYAL BANK  
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*Bankruptcy—Company Engaged in Growing Roses for Sale—Claim of Labourers for Unpaid Wages against Mortgagee of Company's Land—Conduct of Agent of Mortgagee—Notice of Sale and Possession of Bailiff under Distress-warrant—Claim against Bank Holding Security under Bank Act, sec. 88—"Products of Agriculture"—"Wholesaler"—Secs. 2 (1) and 88, subsecs. 1 and 7, of Bank Act.*

The O. company was a horticulturist, growing roses and selling the cut flowers. The defendant company held a mortgage upon the

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lands of the O. company, but the mortgage did not cover the growing bushes, machinery, or equipment, and the business was not mortgaged as a going concern. On the 4th June, 1930, the O. company having made default in payment of interest, B., the vice-president of the defendant company, went to the O. company's place and served and posted up notice of exercising the power of sale. B. was accompanied by a bailiff, who had a distress-warrant and instructions to take an inventory, to stay upon the premises and see that nothing was taken away and not to interfere with the operation of the business. O. gave no instructions as to carrying on the business or as to economy or cutting down expenses. On the 14th June, 1930, the O. company made an authorised assignment in bankruptcy:—

*Held*, that the defendant company had not made itself liable for the unpaid wages of the plaintiff and other labourers employed by the O. company.

Between the 4th and the 14th June, the business was carried on as usual. Roses were cut and forwarded to the customers of the O. company, the proceeds in cash were deposited in the local branch of the defendant bank, and the customers' paper therefor was handed to the bank, which held security under sec. 88 of the Bank Act. The plaintiff sought to make the bank liable alternatively for the unpaid wages:—

*Held*, that the bank could only be liable for wages in respect of a security authorised by subsec. 7 of sec. 88 if it took possession or in any way disposed of the security or of the products, etc., covered thereby.

And *held*, having regard to the provisions of that subsection and to the definition of "products of agriculture" in sec. 2 (1) of the Act, that the bank was not liable, because it did not take possession or in any way dispose of its security or the products covered thereby. Discussion of the meaning of "wholesale" in subsec. 1 of sec. 88, and *held*, that the O. company was not a wholesale purchaser or of dealer in the products of agriculture.

THE plaintiff was a labourer employed by M. Ofield & Sons Ltd.; to him had been assigned the claims of other labourers, and he sued the two defendants for wages unpaid, earned between the 15th May and the 15th June, 1930.

February 5. The action was tried before LOGIE, J., without a jury, at Hamilton.

*C. G. Dynes*, for the plaintiff.

*H. O. E. Braden*, for the defendant London Loan Assets Ltd.

*C. A. Thompson*, for the defendant the Royal Bank of Canada.

February 20. LOGIE, J.:—M. Ofield & Sons Ltd. was a horticulturist, with greenhouses and plant at Grimsby, Ontario. So far as the evidence shews, it was a rose-grower, that is, it grew roses and sold the cut flowers.

The plaintiff is a labourer, to whom has been assigned the claims of a number of other labourers, and he sues for wages unpaid, earned between the 15th May and the 15th June, 1930.

The London Loan Assets Ltd. held a mortgage upon the lands of the company, but this mortgage did not in terms cover the growing plants, machinery, or other equipment of the company, nor was the business mortgaged as a going concern. The Royal Bank of Canada was the company's bank, which held the usual security under sec. 88 of the Bank Act and an assignment of the book-debts of the company.

On the 4th June, 1930, the Ofield company having made default in payment of interest, one J. A. E. Braden, vice-president of the London Loan Assets Ltd., came to Grimsby and served and posted up a notice of exercising power of sale.

This contained the usual notice that the defendant company "intends to proceed forthwith, with or without further notice to you, to enter in possession of the said mortgaged premises and receive and take the rents and profits thereof," etc., etc.

Braden was accompanied by a bailiff, one Blair, who had a distress-warrant. The latter's instructions were "to take an inventory and list, to stay there and see that nothing was taken away, and not to interfere with the operation of the business."

The plaintiff says that on the occasion of Braden's visit, he, Braden, "gave instructions to George Ofield (an official of the company) to carry on as usual, and advised economy," and upon this conversation is founded the plaintiff's claim for wages against the defendant company.

Braden, whose evidence I accept where it conflicts with the plaintiff's or with Ofield's, denies giving George Ofield any instructions to carry on the business or as to economy or cutting down expenses. On the contrary, he did tell Blair not to interfere in any way with the business, as the defendant company had nothing to do with that; and, as far as the defendant company was concerned, "the business could go on as usual." In fact Braden expected that the wages would be paid by the Royal Bank. I accept Braden's statement that there was no conversation about wages until the 13th June.

Between the 4th and the 13th Ofield was endeavouring to form a new company and was anxious to get his organisation together, and about the 13th June the question of wages became pressing. Braden, who had expected the bank to pay these wages, was interviewed. He had had a discussion with the bank officials as to the extent of their security, and this question was still unsettled.

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Orlando Ofield asked Braden if he would arrange to provide for the wages (his own and his employees') if security was furnished. Braden agreed to recommend the payment of the wages by the defendant company if all wage-earners assigned to the defendant company all wages prior to the 1st June as security, and on this understanding had a cheque forwarded for these wages to Hamilton. Before this cheque was handed over, a dispute arose as to the terms of the security, and the proposition fell through. It was a conditional arrangement sought by Orlando Ofield, and the conditions were not fulfilled. This abortive agreement could not in any event affect the plaintiff's claim to wages, and he was not a party to it.

On the 14th June, 1930, M. Ofield & Sons Ltd. made an authorised assignment.

As the case developed, I suggested that the trustee in bankruptcy was a necessary party, but Mr. Dynes alleged that the trustee had no moneys to pay wages in his hands, and no prospects of any assets out of which the wages could be paid, and sought to go on as the case was framed, and this was done.

The liability for wages was one for which the estate of M. Ofield & Sons Ltd. was primarily responsible; and, unless the defendant company by some act of novation or by some agreement whereby the defendant company became responsible to the parties entitled for these wages, there could be no liability to pay; the plaintiff does not contend that any arrangement was made directly or indirectly by the defendant company or any officer with authority to bind the company to pay his wages.

His claim is based entirely upon what he alleged he heard Braden say to George Ofield.

I have found against his version of this conversation; but, even if it had taken place as alleged, it would give him no right of action in his own name directly against the defendant company for his wages.

It was argued that the service of a notice of sale and the leaving a bailiff in possession to take an inventory made the claim of wages against the defendant company sustainable. This is clearly untenable. No claim for wages could be made against the mortgagee, either on the ground of its having taken possession or on the basis of salvage without more.

Between the 4th and the 14th June, 1930, the business of M. Ofield & Sons Ltd. was carried on as usual. Roses were cut and

forwarded for distribution to the customers of the company, and the proceeds in cash were deposited in the bank, and customers' paper therefor was handed to the bank under its assignment of book-debts. The London Loan Assets Ltd. received none of this, and exercised no authority or control over the business or over the plaintiff or other employees of the company, and never agreed to pay their wages. Under these circumstances the defendant company is not liable.

Is the bank liable? It could only be liable for wages in respect of a security authorised by subsec. 7 of sec. 88 of the Bank Act if it took possession or in any way disposed of the security or of the products, etc., covered thereby.

It is contended on behalf of the bank that the security is not such a security as is authorised by sec. 88 of the Bank Act, and that, therefore, the penalty as to wages attached to such a security is not incidental to the security in question.

Dealing with this question first: A bank is prohibited generally from lending upon the security of immovable property or goods, wares and merchandise, by subsec. 2, clause (c), of sec. 75 of the Bank Act. The only exception to this general prohibition which need be considered here is contained in subsec. 1 of sec. 88, which reads as follows:—

“The bank may lend money to any wholesale purchaser of or dealer in products of agriculture, the forest, quarry and mine or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock or the products thereof upon the security of such products, or of such live stock or dead stock or the products thereof.”

Was M. Ofield & Sons Ltd. a wholesale purchaser of or dealer in the products of agriculture? I think not. So far as the evidence shews, M. Ofield & Sons Ltd. was engaged in raising roses and selling the cut flowers. It sold roses, but did not buy them. It did not sell the rose-bushes which are mentioned in the hypothecation. It made its money not as a wholesale purchaser or dealer but as a rose-grower, and the purport of the section is not to permit the grower to raise money upon the things he is growing, but to enable the dealer to raise money and thereby facilitate the transportation and marketing of the products mentioned. The meaning of the word “wholesale” as used in this section is discussed in Falconbridge on Banking and Bills of Exchange, 4th ed., pp. 241 and 242, as follows:—

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Logie, J.      "No definition of the word 'wholesale' is given in the statute.  
 1931.      In the Century Dictionary it is defined as 'buying and selling by  
 the piece or in large quantity: as, a wholesale dealer;' but it is  
 clear under the statute that the largeness or smallness of the trans-  
 action is not the determining factor. It has been held that a  
 rancher, whose business is raising cattle, is not a 'wholesale pur-  
 chaser or shipper of or dealer in live stock,' within section 88, no  
 matter how large his transactions are, any more than a farmer is  
 a dealer in grain which he raises in large crops. The rancher  
 makes his money not as a wholesale purchaser or shipper or dealer,  
 but as a cattle-grower or cattle-breeder, and the fact that he sells  
 in large or small numbers is merely an incident: *Hatfield v.*  
*Imperial Bank of Canada* (1907), 6 Terr. L.R. 296."

Moreover, if M. Ofield & Sons Ltd. could be considered a  
 wholesaler, the plaintiff must shew that the rose-bushes mentioned  
 in the bank security come within one of the categories mentioned  
 in sec. 88. They could only come within the section if they could  
 be considered to be products of agriculture. Products of agricul-  
 ture are defined in sec. 2(1), as follows:—

"'Products of agriculture,' in addition to the direct products  
 of the soil such as hay, grain, roots, vegetables, fruits and other  
 crops, includes milk, cream, butter, cheese, honey, poultry (dead),  
 and eggs, hides, skins and wool, and dried, canned and preserved  
 vegetables and fruits."

The plaintiff described the methods in which the rose-bushes  
 were grown. He said that approximately one-third were grown  
 in the ground in long rows between boards placed on edge. These  
 clearly are immovables and part of the land. The remaining two-  
 thirds were grown on long benches supported by posts driven into  
 the earth and so were separated from the ground. Can they be  
 considered as a crop or the products of the soil? Crop is defined  
 in the Century Dictionary as "corn and other cultivated plants  
 grown and garnered; the produce of the ground; harvest; in a  
 more restricted sense, that which is cut, gathered or garnered from  
 a single field, or of a particular kind of grain or fruit, or in a  
 single season: as, the wheat-crop, the potato-crop."

When a statute says that certain words, in addition to meaning  
 certain things which these words ordinarily mean, shall include  
 other things, the rule is that the enumerated objects are exhaustive,  
 and the *ejusdem generis* rule would restrict the meaning to edible  
 products (except hides, skins, and wool, which in life cover an

edible product) grown by the farmer or agriculturist. Are these rose-bushes then products of agriculture? While, according to its derivation, the word "agriculture" signifies the art of cultivating a field, and "horticulture" signifies the art of cultivating a garden, it is extremely doubtful if roses or rose-bushes are agricultural products, but I cannot say that the meaning of the statute should be so restricted as not to cover the inedible products of the garden under the heading of the products of agriculture. I am not, however, driven to base my judgment on this.

The rights of wage-earners under subsec. 7 of sec. 88 depend upon whether the bank "takes possession or in any way disposes of the said security or of the products, goods, wares and merchandise, stock or products thereof or grain covered thereby." If the security in question could be considered as a security authorised by sec. 88, the plaintiff has not shewn that the bank either took possession or disposed of the security or products covered thereby. No evidence at all was adduced to shew that the bank took possession.

Did it dispose in any way of its security or the products covered thereby? "Dispose," in the sense in which it is used, is defined in the Century Dictionary as follows: "To make over, or part with as by gift, sale or other means of alienation, alienate or bestow."

The bank still holds its security. It never took possession of the rose-bushes or cut flowers or disposed of them, but it is contended that by an agreement of the 22nd July, 1930, the bank admitted that the rose-bushes had been and were the property of the trustee, who was therefore free to release his interest in the rose-bushes to London Loan Assets Limited (para. 2, exhibit 3), and that this was a disposition of its security. But the bank refrained from disposing of anything. It agreed to refrain from making any claim without alienating anything (para. 4, exhibit 3). It received \$1,550. In effect it disposed of a law-suit and not the security itself.

Much was made of the order of the Registrar in Bankruptcy, made on consent, and declaring that the growing plants were the property of the trustee, and the fact that the order of the Registrar made on consent did not refer to the \$1,550 agreed to be paid to the bank. It is said that the wage-earners were not represented on this application, but it is clear that they were represented by the trustee in bankruptcy, and bound by what he did.

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In my opinion the bank is not liable, because it did not take possession or in any way dispose of its security or the products covered thereby.

*Action dismissed with costs.*

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[APPELLATE DIVISION.]

1931.

RE CITY OF TORONTO AND SAUNDERS.

March 6. *Municipal Corporations—Proposal for Work on Local Improvement Plan—Extension of Street and Opening of New Streets—Local Improvement Act, R.S.O. 1927, ch. 235, secs. 2, 6, 7, 8—Application to Ontario Railway and Municipal Board for Approval—Assessment of Landowners whose Lands were Specified as to be Benefited for Part of Cost—Objection—Board Declining Jurisdiction—Proposed Work not within sec. 2 (1)—Appeal from Board's Ruling—Divided Appellate Court.*

Under sec. 2 (1) of the Local Improvement Act, the council of a corporation may undertake as a local improvement (a) the opening, widening, extending, grading, altering the grade of, diverting or improving a street; (b) opening or establishing a new street. The city corporation applied to the Ontario Railway and Municipal Board, under sec. 6 of the Act, for the Board's approval of a proposed work which involved the opening and grading of five new streets, the widening and grading of three streets, and the extension and grading of one. Part of the estimated cost was to be provided out of the general funds of the municipality and the balance to be paid by a special assessment of real property specified as immediately benefited. The owners of parts of the lands assumed to be benefited gave the notice prescribed by sec. 6 (1), that they objected to the work being undertaken upon the ground that it was a work for the general benefit of the municipality or of a section or district thereof. The Board declined to grant or withhold its approval, holding that it had no jurisdiction because the proposed work did not come within sec. 2 (1) (a) or (b):—

Upon the application of the city corporation for leave to appeal, a Divisional Court was divided in opinion, LATCHFORD, C.J., and RIDDELL, J.A., agreeing with the Board's view, and ORDE and FISHER, J.J.A., being of opinion that the Board had jurisdiction.

In the result, the application was refused.

MOTION on behalf of the Corporation of the City of Toronto for leave to appeal to this Court from an order of the Ontario Railway and Municipal Board.

December 16, 1930. The motion (treated as an appeal) was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, J.J.A.

*G. R. Geary, K.C.,* for the applicant corporation.

*R. S. Robertson, K.C.,* for Saunders and others opposing the application.

March 6, 1931. LATCHFORD, C.J.:—This is a motion on behalf of the Corporation of the City of Toronto for leave to appeal to this Court from an order of the Ontario Railway and Municipal Board, dated the 11th September, 1930, holding that the Board had no jurisdiction to entertain an application made under sec. 6 of the Local Improvement Act, R.S.O. 1927, ch. 235, for its approval of a certain work fully described in the judgment of the Board.

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The work involves the opening and grading of five new streets, the widening and grading of three streets, and the extension and grading of Douglas-drive, at an estimated cost of \$4,200,000, part of which, \$3,576,854, is to be provided out of the general funds of the municipality. The balance is proposed to be paid by a special assessment of the real property specified as immediately benefited. If actual cost exceeds (as seems not improbable) or falls short of the estimate, the assessment shall be for such actual cost in the same proportions.

The estimate is merely for making a succession of improvements that will later entail the paving of the roadways and sidewalks, and the installation of sewers, water and other necessary services, at an unstated, but obviously enormous, additional expenditure.

Mr. Saunders and his associates are the owners of parts of the 90,711 feet, 10 inches, of lands assumed to be benefited, and gave the notice prescribed by sec. 6(1) of the Act, that they objected "to the work being undertaken, upon the ground that it is a work for the general benefit of the municipality or of a section or district thereof."

When such an objection is made, the work cannot be undertaken without the approval of the Board.

The Board declined to grant or withheld its approval, considering that it had no jurisdiction in the circumstances. The city corporation contended that the Board had jurisdiction; hence this appeal.

The only other sections of the Act which are applicable are 2, 7, and 8.

Under 2(1) the council of a corporation may undertake as a local improvement works such as "(a) Opening, widening, extending, grading, altering the grade of, diverting or improving a street; (b) Opening or establishing a new street."

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The remaining paragraphs, (c) to (p), of subsec. (1), similarly, with two exceptions, refer in the singular to particular works—construction of a bridge, constructing or extending a sewer or a watermain, paving a street, making a kerbing, a sidewalk, or a boulevard, extending a water-system, acquiring, etc., a park or square, or a public drive, constructing a subway under a railway. Only in two of the paragraphs is the plural used, (k), “such further works,” restricted to townships, where works had previously been constructed for the supply of electrical power to owners, and (m), which mentions “retaining walls, dykes or breakwaters,” which cannot be constructed on the initiative of the council, but on petition only.

By sec. 28(i) of the Interpretation Act, R.S.O. 1927, ch. 1, unless a contrary intention appears, the singular number shall include more persons, parties or things of the same kind than one.

In the discrimination manifested in the subordinate paragraphs of sec. 2(1) of the Local Improvement Act, does such an intention appear? Where the plural is used in regard to electric “works” and “appliances,” the ambit of the Act is restricted to townships, and where used in reference to retaining walls, etc., the restriction is to works undertaken on petition only, thus excluding works like what is called here the proposed extension of a street, but what is in fact the opening and grading of not one but five new streets, the widening and grading of three existing streets, and the extension and grading of a ninth street—all works to be undertaken upon “the initiative” powers contained in secs. 7 and 8 of the Act.

Even if the proposed work can be regarded as falling within para. (a) of sec. 2, as well as within para. (b) of the same section—as to which I think it unnecessary to decide—I incline to the opinion that it is not a *local* improvement within the meaning of the Act, but is, in fact, what is described in sec. 6 as a “work for the general benefit of the municipality or of a section or district thereof.”

Further, I am also humbly of opinion that the work does not fall within the scope of sec. 8—the enumeration of what the municipal council might determine should be done upon the initiative of the council without petition (sec. 7(1) (b)) comprises nothing more than works which may properly be regarded as *local* improvements.

I accordingly think the application and appeal should be dismissed with costs.

RIDDELL, J.A.:—The City of Toronto intended to undertake a work which it describes as “The extension of a street northerly from Bloor-street about opposite Jarvis-street, to connect with Mount Pleasant-road at St. Clair-avenue, and known as ‘Jarvis-street extension,’ all as set out in the notice of intention to undertake the same as a local improvement published by the city clerk on the 4th July, 1930.”

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What is called “the extension of a street” is cutting a way through private property from Bloor-street north-west, leaving Bloor-street about opposite the end of Jarvis-street, and passing over what is now private property to St. Clair-avenue, there to join the present Mount Pleasant-road, at a cost estimated at \$50,000.

The work is said by the city to comprise:

(a) The opening and grading of a new street at a width of 78 feet more or less, commencing at the north side of Bloor-street, about opposite the northerly terminus of Jarvis-street, and extending in a north-easterly direction to a point on Huntley-street, the Rosedale Valley ravine to be spanned by a bridge;

(b) The widening and grading of Huntley-street, which street is at this particular point to be made use of for the proposed new street or extension to South-drive;

(c) The opening up and grading of a new street from South-drive about opposite the northerly terminus of Huntley-street to Crescent-road, about opposite Wrentham-place;

(d) The widening and grading of Wrentham-place;

(e) The opening and grading of a new street from the north side of Roxborough-street about opposite Wrentham-place, in a north-easterly direction, to connect with Rosehill-avenue, including the crossing of Park-drive reservation by a bridge, and crossing the Canadian Pacific right of way by a subway;

(f) Widening of Rosehill-avenue;

(g) The opening and grading of a new street from the intersection of Inglewood-drive and Clifton-road in a north-easterly direction to Glenrose-avenue;

(h) The opening and grading of a new street from about opposite the proposed new street as above described, and extending northerly from Glenrose-avenue to St. Clair-avenue, about opposite the southerly terminus of Mount Pleasant-road; all of which works are referred to as an extension of Jarvis-street by a street 78 feet

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1931. limit of St. Clair-avenue."

RE CITY OF TORONTO AND SAUNDERS Riddell, J.A. The city applied to the Ontario Railway and Municipal Board for its approval under sec. 6 of the Local Improvement Act, R.S.O. 1927, ch. 235; the Board, holding that its jurisdiction was limited to cases where "the work is the opening, widening or extension of a street or the construction of a bridge . . ." and thinking that the present was not such a case, declined to exercise jurisdiction—the city now appeals, the sole question being, "Has the Board jurisdiction in the premises?"

The question must be answered by an interpretation of the provisions of sec. 2; these, so far as of importance on this inquiry, are as follows:

"2—(1) A work of any of the characters or descriptions hereinafter mentioned may be undertaken . . . as a local improvement, that is to say:

"(a) Opening, widening, extending, grading, altering the grade of, diverting or improving a street;

"(b) Opening or establishing a new street;

"(c) Constructing a bridge as part of a street . . ."

It is only in the case of the work coming under (a) or (c) that sec. 6 expressly applies; no jurisdiction is given where the work is under (b). Leaving aside for the moment all but the official representation by the city of the project, we find that, in the particulars (a) is the opening of a new street, as are (c), (g), and (h), while the work on Huntley-street, in (b), is "to be made use of for the proposed new street;" while the purpose of (d) and (f) is not specifically stated, of course it is for the same purpose. The officers of the city clearly thought that the work was "opening and establishing a new street;" and I can find no reason for thinking that they were mistaken.

That this work really comes under (b) seems perfectly clear; but it is argued that it also comes under (a). This would involve the proposition that the Legislature was indulging in idle superfluity of language when it made a separate species of what was, after all, but a variety included in another species. The modern way of interpreting the language of the Legislature is to credit the legislators with knowing what they mean and having a sufficient knowledge of the English language to enable them to express their meaning clearly; they are not to be charged with using unnecessary

language, unless that clearly appears. Where the Legislature has made two distinct classes, the Court ought not to say that there is only one, unless it is manifest that such was the intention of the legislating body.

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I am of the opinion that the Board was right in the interpretation of the statute. If there is a mistake, it may be rectified by the Legislature.

The application and appeal must be dismissed with costs.

ORDE, J.A.:—I am of the opinion that the Ontario Railway and Municipal Board has placed too narrow a construction upon the provisions of sec. 6 of the Local Improvement Act, R.S.O. 1927, ch. 235, and has erred in holding that it has no jurisdiction to deal with the city's application under that section.

I do not agree that the paragraphs (a) to (p) which describe the various types of work which may be undertaken as local improvements under sec. 2 are to be read as if they were mutually exclusive. It is impossible to read them in that way without doing violence to the true meaning of the English language. It is apparent that many of the types overlap, and that which may be done under the particular words of one paragraph may also be done under the general words of another. And I can only read several of the paragraphs as being inserted for more abundant caution.

This, in my judgment, is the explanation of para. (b), "Opening or establishing a new street." I can see no real difference between "Opening . . . a street," which is provided for by para. (a), and "Opening . . . a new street." If a street is opened where no street existed before, it must be a "new" street, in the nature of things—unless the provision as to opening a street in para. (a) was intended to mean the physical opening of a street or road-allowance, already dedicated as a highway, and the opening of a new street in para. (b) was to apply to the creation and opening of a highway not already dedicated. But this distinction is, I think, a far-fetched one, and cannot be resorted to when other paragraphs are looked at. For example, para. (a) includes the "improving" of a street. Paragraph (f) provides for "paving a street." Surely paving a street is "improving" it, though I can recall a time when some people who cared for their horses' feet did not think so.

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The words "the opening, widening or extension of a street," in sec. 6, must be read in their natural sense. In the present case, even if the proposed work is not strictly an "extension" of Jarvis-street, and is to be regarded as the "opening of a new street," it is nevertheless "the opening of a street" (whether "new" or "old," if there can be any such distinction, which I doubt), and comes therefore within sec. 6.

It seems to have been assumed that because the proposed extension of Jarvis-street commenced the other side of Bloor-street, it could not be an extension. Why not? Is the extension of a street within the meaning of para. (a) to be confined to cases where the extension commences from a dead end or *cul de sac*? That surely was not the intention of the Act.

We are not called upon here to deal with the points touched upon during the argument as to whether or not the by-law was of such a character as to constitute a "local" improvement at all, as contemplated by the Act, and as to whether or not several different and distinctive types of work can be included in the by-law and the cost or proportionate cost assessed as a whole against certain ratepayers. Those are matters which must either be dealt with by the Board or perhaps by the Courts.

I think the Board has jurisdiction under sec. 6 to deal with the city's application and that the appeal should be allowed with costs against those who opposed it.

FISHER, J.A., agreed with ORDE, J.A.

*The Court being equally divided, the application was dismissed with costs.*

#### [APPELLATE DIVISION.]

1931. ATTORNEY-GENERAL FOR ONTARIO V. NATIONAL TRUST CO. LTD.  
 March 9. *Succession Duty—Tax upon Property Transferred by Person before Death—Immediate Gift inter Vivos—Valuation of Property at Time of Gift—Succession Duty Act, R.S.O. 1927, ch. 26, sec. 8, subsec. 2 (b) (ii).*

The judgment of ORDE, J.A. (1930), 66 O.L.R. 163, was affirmed on appeal (MAGEE, J.A., dissenting).

AN appeal by the Attorney-General from the judgment of ORDE, J.A. (1930), 66 O.L.R. 163.

October 3, 1930. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*D. L. McCarthy*, K.C., and *J. T. White*, K.C., for the appellant, argued that the gift to the defendant *Mary Marjorie Wilder*, by her late husband *William Edward Wilder*, of 500 shares in the capital stock of *Picton Securities Ltd.*, should be valued for purposes of succession duty as of the 28th May, 1929, being the date of the donor's death, and not as of the 30th December, 1925, which was the date of the gift. Counsel relied upon the following sections of the Succession Duty Act, R.S.O. 1927, ch. 26, namely, sec. 4, sec. 8, and particularly para. (b)(ii) of subsec. 2 thereof, para. (a) of subsec. 1 of sec. 12, and subsec. 5 of sec. 13, as shewing that the property which formed the subject of the gift was to be treated as if it had remained the property of the donor, and had not passed to the donee until the donor's death, and that it must be valued accordingly. Reference to *Lord Strathcona and Mount Royal v. Commissioners of Inland Revenue*, [1929] Scots L.T.R. 629.

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*W. N. Tilley*, K.C., for the defendants, respondents, contended that the gift should be valued for purposes of succession duty as of the date of the gift and not as of the date of the death of the deceased. The statute must be construed strictly, and the language of the sections relied upon by the appellant were not sufficiently express and unambiguous to bear out his contentions. The statute does not say that the property which was the subject of the gift or any increment thereto should form part of the donor's estate at his death, nor that such increment should be taxed as though it formed part of his estate.

March 9. GRANT, J.A.:—This is an appeal from the judgment of Orde, J.A., pronounced on the 20th August, 1930, upon a motion for judgment based upon admissions of fact contained in the pleadings.

The judgment is declaratory in form and gives effect to the contention put forward by the defendants.

The subject-matter of the issue between the parties had to do with the construction to be placed upon certain sections of the Succession Duty Act of Ontario, which may be found in R.S.O. 1927, ch. 26, as amended in 1928. The 1928 amendments do not appear to affect the sections involved. The material facts are set out in the reasons for judgment of Orde, J.A., and may be summarised as follows:—

One *William Edward Wilder*, of Toronto, died on or about the 28th May, 1929. The trust company is executor and trustee under

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his will, and the defendant Mary M. Wilder is his widow. The late Mr. Wilder, being a man of considerable wealth, on or about the 30th December, 1925, gave to his wife 500 shares of the capital stock of a private company, known as Picton Securities Limited, incorporated under the Ontario Companies Act, and having its head office in Ontario. The gift was absolute in character and formed a comparatively small portion of the fortune of the deceased. The value of the shares at the time of the gift was agreed upon between the parties as having been \$50,250. At the time of Mr. Wilder's death, so successful had the company been in the interval, that the shares had increased in value to the (agreed) sum of \$264,183.50.

The plaintiff contends that the valuation to be placed upon these shares, under the provisions of the Succession Duty Act, is the larger sum, stating that the value must be that existing at the date of the death of the deceased, and not at the date of the gift, as urged by the defendants.

There is no suggestion that the transaction was other than an absolute gift by the husband to his wife, taking effect at the time when the gift was made and absolutely excluding the donor from all interest and right in the subject-matter of the gift as and from the time when it was made.

The decision of Orde, J.A., was to the effect that for the purpose of the Succession Duty Act the 500 shares of Picton Securities Limited are to be valued as of the date of the gift thereof, namely, the 30th December, 1925.

The following appear to be the relevant sections and subsections of the statute given in an order which appears to make for convenience of consideration of the issue involved:—

“8.—(1) All property situate in Ontario and any income therefrom passing on the death of any person . . . as well as all other property subject to succession duty upon a succession shall be subject to duty at the rates hereinafter imposed.

“(2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property:— . . . .

(b) . . . .

“(ii) Any property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos* . . . . made since the 1st day of July, 1892.”

“1. In this Act, . . . .

“(f) ‘Passing on the death’ shall mean passing either imme-

diately on the death or after an interval, either certainly, or contingently, and either originally or by way of substitutive limitation . . . ;

“(g) ‘Property’ shall include real and personal property of every description . . . capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.”

“4. In determining the dutiable value of property or the value of a beneficial interest in property the fair market value shall be taken as at the date of the death of the deceased, and allowance shall be made for reasonable funeral expenses, debts and encumbrances and Surrogate Court fees (not including solicitor’s charges); and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subject of property liable thereto; but an allowance shall not be made” (certain debts specifically excepted).

“1. In this Act,

“(a) ‘Aggregate value’ shall mean the fair market value of the property after the debts, encumbrances and other allowances authorised by section 4 are deducted therefrom, and for the purposes of determining the aggregate value and the rate or duty payable the value of property situate out of Ontario shall be included;

“(b) ‘Beneficial interest’ and ‘dutiable value’ shall mean the fair market value of the property after the debts, encumbrances, and other allowances and exemptions authorised by this Act are deducted therefrom.”

“9. Subject to the exceptions mentioned in sections 6, 7 and 8 there shall be levied and paid for the purpose of raising a revenue for Provincial purposes in respect of any succession or on property passing on the death according to the dutiable value, the following duties . . . .”

“12.—(1) Every heir, legatee, donee or other successor, . . . shall be liable for the duty upon so much of the property as so passes to him, and shall within six months after the death of the deceased . . . file with the Registrar of the Surrogate Court . . . a full, true and correct statement under oath shewing” (setting out particulars of property, etc.).

Certain other provisions of the statute were referred to upon the argument, as throwing light upon the sections quoted, or otherwise assisting in the proper interpretation thereof. To these further reference will be made.

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prevail, it must be chiefly by virtue of the provisions of secs. 8 and 4, it being urged that by sec. 8 the subject of a gift *inter vivos* becomes "property passing on the death" for the purposes of the Act, and that the value of such property, by virtue of the provisions of sec. 4, is to be the fair market value as at the date of the death of the deceased.

In approaching the question involved, it is pertinent to note that, but for the statutory provisions which may have affected the matter, there was no legal obstacle in the way of the late Mr. Wilder making an absolute and perfectly valid gift to his wife of the shares in question. Apart from any such statutory provisions, such an absolute gift could and did validly and effectually transfer to her the property in the shares which, as a result of such transfer, passed out of the control of the donor, and could not form any part of his estate upon his decease, nor could they be subjected to any taxation to which his estate might be liable.

Before going on to deal with the provisions of the Act, it may not be amiss to refer to the well-known rule governing the construction to be placed upon statutes of this and a similar character. As is stated by the author of Craies' (Hardcastle) Statute Law, 4th ed. (1907), p. 109:—

"Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes:—(1) imposing a tax or charge; (2) conferring or taking away legal rights, whether public or private."

That, in order to impose or to increase or make more onerous a tax or charge upon a subject or upon his estate or property, the Crown must shew that the subject or his property or estate comes clearly within the language of the statute imposing the tax, has been affirmed in a long line of judicial decisions, a number of which are referred to in the passage (in part) above quoted. The rule is so well established that citation of authorities appears almost superfluous.

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the

statute" (Lord Cairns in *Partington v. Attorney-General* (1869), L.R. 4 H.L. 100, at p. 122).

"Therefore the Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted that can only be cured by legislation, and not by an attempt to construe the statute benevolently in favour of the Crown" (Collins, M.R., in *Attorney-General v. Earl of Selborne*, [1902] 1 K.B. 388, at p. 396).

"In the case of this statute" (referring to the Australian Succession Duties Act) "it would be sufficient to say that clear enactments are required for the imposition of a tax, and that this enactment is not clear" (Lord Hobhouse delivering the judgment of the Judicial Committee in *Simms v. Registrar of Probates*, [1900] A.C. 323, at p. 337).

"Lastly, the intention to impose a tax or duty, or to increase a tax or duty already imposed, must be shewn by clear and unambiguous language and cannot be inferred from ambiguous words" (Lord Parker of Waddington, delivering the judgment of the Judicial Committee in *Brunton v. Commissioner of Stamp Duties*, [1913] A.C. 747, at p. 760).

If, in the case at bar, the plaintiff's contention is to prevail, then a sum or value of \$200,000, the property of the widow, vested in her by the law of this Province, which did not at any time belong to the deceased, never was his property, was not actually given by him to her (it was not then in existence), and did not form any part of his estate, either actually or notionally, is to be subjected to taxation as though it did form part thereof. If such is to be the effect to be attributed to the language of the Act, then that language must so state in very clear and unambiguous words.

I note at once that the statute does not even say that the property, the subject of the gift, shall form part of his estate at his death. Much less does it say that any increment (the increased value) which may accrue thereto, after the property had validly passed from him, and before his death, and with which he had nothing whatever to do, should form part of his estate. Neither does it state that such increment shall be subject to taxation as though it formed part of his estate. Doubtless the Legislature would have power so to enact (however greatly one's sense of justice might be offended at such legislation, in the absence of any suggestion of *mala fides* in the making of the gift), but it has not so enacted.

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If, therefore, the shares of stock given by the late Mr. Wilder to his wife in 1925 are to be not merely subject to duty under this statute, but are to be valued, for the purpose of estimating that duty, as of the date of the death of the donor, and not as of the time when the gift was made, the Crown must shew that this is provided for by the statute in clear and unambiguous language.

There is a further rule for the guidance of the Courts in the interpretation of statutes, which may be of assistance, and that is, that where the language used is capable of more than one construction or meaning, that one is to be adopted which appears more reasonable and just, and less offends our sense of justice.

"It is quite true, as Bunday, J., intimates when he is pointing out the severity of the law, that Courts must nevertheless construe it according to its true meaning. But where there are two meanings each adequately satisfying the language, and great harshness is produced by one of them, that has legitimate influence in inclining the mind to the other. . . . It is more probable that the Legislature should have intended to use the word in that interpretation which least offends our sense of justice" (Lord Hobhouse in the *Simms* case, [1900] A.C. at p. 335).

"Where in the statute words are used capable of more than one construction, the results which would follow the adoption of any particular construction are not without materiality in determining what construction ought to prevail.

"Suppose, for example, . . . then . . . the widow and children would be totally deprived of the relief intended (by the will) for them. There is no indication in the Act that any such result was intended, and the result itself is so strange that the Court may well hesitate in construing the doubtful words of the statute in such a way as to bring it about" (Lord Parker in the *Brunton* case, [1913] A.C. at p. 759).

By sec. 8(2) (b) (ii), these shares, being the subject of an immediate gift *inter vivos*, are to be deemed to be included for the purpose of the Act within the class of property described in the Act as "property passing on the death of the deceased." I take this to mean that wherever the Act uses the expression "property passing on the death of the deceased," or clearly purports to deal with the same, the provisions thereby enacted must apply to the subject-matter of gifts *inter vivos*. This, of course, is a purely arbitrary and artificial quality engrafted upon gifts *inter vivos*, and contrary to the facts respecting the same, as absolute gifts *inter vivos* do not pass on the death of the deceased, nor are they,

apart from the effect of the statute, in any way affected by the death of the donor. The Act does not state that the subject-matter of a gift *inter vivos* shall not pass to the donee at the time the gift is made, nor does it provide that such gift shall only take effect at the time of the death. All that the Act provides in this regard is, that a certain expression, "property passing on the death of the deceased," shall for the purposes of the Act be deemed to include "property taken under a disposition operating . . . as an immediate gift *inter vivos*." It is apparent that the subject-matter of a gift *inter vivos* can only be "deemed to be included" in "property passing on the death of the deceased" if the gift is to be deemed to have been made or to have taken effect when the death actually took place; or the death is to be deemed to have occurred at or just before the time when the gift was actually made or took effect. The Act does not specify either, and the one is just as reasonable and as readily to be inferred from the language used as is the other. In considering the effect of these exact words in the English Finance Act, Lord Atkinson states:—

"Section 2 enacts that property which, in fact, has passed while a person is alive shall, in certain cases, be deemed to have passed as if he were then dead" (*Attorney-General v. Milne*, [1914] A.C. 765, at p. 773).

If then the death is to be deemed for this purpose to have occurred when the gift was actually made or took effect, the value of the property at that time would be the value at the time of the death, within the meaning of the provision in that regard, and would "less offend our sense of justice" than the interpretation put forward by the plaintiff. This would not be an unreasonable construction to be placed upon the language used, in the opinion of Lord Blackburn in the *Strathcona* case (*infra*), when dealing with the more specific wording of the English statute: [1929] Scots L.T.R. at p. 635. It appears to me that one or two other clauses in this same sec. 8 support that view. Section 8(i) reads:—

"Any property transferred since the 1st day of July, 1892, for partial consideration in money or money's worth paid to the transferor . . . to the extent to which the value of the property so transferred exceeds the value of the consideration so paid."

To illustrate: take a case in which property was transferred, on the 1st August, 1892, the property received by the transferor being then worth \$1,000 less than that which he transferred. Transferor dies in 1930, 38 years after the transfer was made. During the interval the property transferred to him has so fallen

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in market value as to be almost worthless, and, on the other hand, the property transferred by him has increased in value five-fold. By this subsection the excess in value is to be liable to the tax, as being included in "property passing on the death of the deceased." Is that excess in value to be determined as of the time of and under the conditions existing at the death? If the statute so directs, in clear unambiguous words, then the Courts must so determine; but, unless the language is so clear and explicit as to be incapable of any other less unreasonable and less unjust construction, I do not think any court would reach such a decision. So also with para. (c) of sec. 8(3), which provides that no duty shall be payable in respect of property "actually and *bonâ fide* transferred for full consideration," etc.

Is the question whether it was full consideration or not to be determined as of the time when the transfer took place or 20 or 30 years later, when the death occurred?

When one traces back the provision of the statute by which the subject of a gift *inter vivos* is made liable to duty, the reason for it is at once apparent.

At first, only gifts which were "*mortis causâ*" and those made in contemplation of death were affected. Later on, the Act was amended to take in all gifts made within 12 months before the death. Such gifts were considered to be subject to the suspicion that they had been made with a view to evading liability to death duties, and the Legislature endeavoured to defeat that purpose. The period of 12 months has eventually been lengthened to cover gifts made since the 1st July, 1892. The purpose of the legislation was, quite evidently, to prevent a man, by making such gifts, from getting rid of his property and so cutting down the duty payable at his death. The then value of what he was giving away was what the legislation aimed at, and, in my opinion, the effect which the plaintiff puts forward was never contemplated. If it had been, it would have been a simple matter to have said so.

It appears to me that when sec. 4 provides the manner in which "dutiable value" of property is to be determined, it is not referring at all to property which only "notionally" passes on the death of the deceased, but to property which was actually part of the deceased's estate. The language of the section is certainly not "clear and unambiguous," to the effect that property, the subject of a gift *inter vivos*, which only "notionally" passes "on the death of the deceased," is intended to be included when the word "property" only is used. The language of the latter part of the

first paragraph of this section, also, makes rather against such an interpretation. It provides that "allowance shall be made for reasonable funeral expenses, debts and encumbrances and Surrogate Court fees (not including solicitor's charges);" and it goes on to provide that such allowance shall be deducted from the "dutiabie value," etc. Such a provision would not be, in any sense, appropriate if the section were dealing with property, the subject of a gift *inter vivos*, with which the deceased had parted many years previously, and which was in no way subject to his funeral expenses or debts.

In order to support the construction put forward by the plaintiff, sec. 4 would have to read as though there were inserted in it a provision that, where the word "property" is used, it shall be deemed to include all property which, by sec. 8, is "deemed to be included" in and by "property passing on the death of the deceased."

In other words, a purely arbitrary and artificial meaning and application explicitly given by the Act to one expression is to be extended and made applicable to another expression. It is sufficient to say that the Act does not so state.

The only decision cited as supporting the plaintiff's contention is *Lord Strathcona and Mount Royal v. Commissioners of Inland Revenue*, [1929] Scots L.T.R. 629, a judgment of the Court of Session (First Division) in Scotland. The judgment appealed from is reported at p. 249 in the same volume. The question involved was as to liability to estate duty in respect of the increased value of shares of stock in certain incorporated companies, which shares had been the subject of a gift *inter vivos* within the statutory period of three years before the death of the donor, the exact point being whether the value of the shares was to be determined as of the date of the gift or as of the date of the death. The statutory provisions read as follows:—

"Section 1. In the case of every person dying after the commencement of this part of this Act, there shall . . . be levied and paid, upon the principal value ascertained as hereinafter provided of all property . . . which passes on the death of such person a duty called 'estate duty.'"

"Section 2(1). Property passing on the death of the deceased shall be deemed to include the property following . . . .

"(c) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, . . . ."

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Section 38 of the Customs and Inland Revenue Act, 1881,  
enacts:

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"Section 38 . . . . (2) The personal or movable property to be included in an account shall be property of the following descriptions, viz.:—

"(a) Any property . . . . taken under a voluntary disposition, made by any person so dying . . . purporting to operate as an immediate gift *inter vivos* which shall not have been *bonâ fide* made twelve months before the death . . . ."

"Section 7(5). The principal value of any property *shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.*"

Without presuming to express any opinion as to the correctness or otherwise of that decision, based as it was upon the language of the English statute, it seems to me manifest that there is a most material and substantial difference between the two Acts. In the English Act, sec. 1, which provides for the levy of the duty, provides that it shall be "levied . . . upon the *principal value ascertained as hereinafter provided* of all property . . . . which passes on the death of such a person," etc.

It will be noted that by this section it is expressly stated that the principal value on which the duty is to be levied is to be "ascertained as hereinafter provided" as to all property passing on the death of the deceased; sec. 2 follows, and provides that property passing on the death of the deceased shall be deemed to include the property which is the subject of a gift *inter vivos*; sec. 7(5) states the manner, referred to in sec. 1 as "hereinafter provided," in which the principal value is to be estimated, namely, which is to be the price which such property would fetch if sold in the open market at the time of the death of the deceased.

It is quite evident, upon a perusal of the reasons for judgment, that the decision was based upon the explicit language of the sections quoted, and which differs, in particulars vital to the question under consideration, from the language of our statute. In my opinion, the case is clearly distinguishable upon that ground.

In my judgment therefore, the plaintiff's appeal must fail for the reason that the statute does not provide, in clear and unambiguous language, that the value of the subject-matter of the gift *inter vivos*, and upon which as a basis the duty is to be calculated, is to be such value as that property may have at the time of the death of the donor. I would dismiss the appeal with costs.

MULOCK, C.J.O., agreed with GRANT, J.A.

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HODGINS, J.A.:—The question in this case arises from the desire of the Province to tax under the Succession Duty Act, R.S.O. 1927, ch. 26, as amended in 1928, 500 shares of the capital stock of a private company known as Picton Securities Limited. These shares were given by the late W. E. Wilder to his wife on or about the 30th December, 1925, as an absolute gift. She has retained the shares, and, on the death of Mr. Wilder, which occurred on the 28th May, 1927, the taxing authorities put forward a claim under the Succession Duty Act in which the amount of the tax is based upon the present value thereof, which is stated to be about five times the value of the shares when given to the wife. I expressed my opinion in *Erie Beach Co. Ltd. v. Attorney-General for Ontario* (1929), 63 O.L.R. 469, at p. 481, that there were two classes of property subject to tax under the Succession Duty Act, namely, property which was subject to succession duty “upon a succession,” as defined in sec. 3, and, secondly, “all property in Ontario . . . passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere.”

The shares in question here do not come under sec. 3 as “a succession” subject to duty, as that section applies only on the beneficial interest arising on the death of some person domiciled in Ontario. Here it is obvious, and indeed was admitted, that the beneficial interest passed when the gift was made. It is however contended that the shares are taxable under sec. 8, subsec. 2(b) (ii), which is as follows:—

“Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property . . . any property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, made since the 1st day of July, 1892.”

The shares in question appear to be included in the words I have just quoted, as subject to taxation, but when the question arises as to the value to be put upon them for taxation purposes, difficulties occur. The Province contends that sec. 4, which reads—“In determining the dutiable value of property or the value of a beneficial interest in property the fair market value shall be taken as at the date of the death of the deceased”—applies to this case. I am unable to reach that conclusion. This property did not pass on the date of the death of the deceased, but it is to be “deemed”

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for all purposes of the Succession Duty Act to have passed at that time. Now what was it that did pass? It was stock to the value of \$50,250 and not stock to the value of \$264,183.50, which last figure, it is agreed, is the present value of the shares.

I have no doubt that the meaning of the word "deemed" used in sec. 8 of this Act is that given to the same word by Mr. Justice Riddell in *Re Rogers and McFarland* (1909), 19 O.L.R. 622. That learned Judge in that case considered practically all the leading authorities in England and in Canada, and concluded that, as there used, the meaning was "considered, adjudged or held for the purpose of the statute." I may also add the definition in *Lawrence & Sons v. Willcocks*, [1892] 1 Q.B. 696, at p. 699, where the words "deemed to be liquidated damages" were said to mean "deemed to be so, whether they are so or not." In *Green v. Marsh*, [1892] 2 Q.B. 330, the words were to the effect that a security for money "shall be deemed to be a bill of sale," and they were treated as equivalent to saying that, while it was not a bill of sale, it was to be treated as one for the purpose of registration. This is what Lord Cairns, L.C., in *Hill v. East and West India Dock Co.* (1884), 9 App. Cas. 448, at p. 455, calls a statutory fiction.

The alternative meaning attributed to the word "deemed" in *Hickey v. Stalker* (1923), 53 O.L.R. 414, namely, that it carries only a *primâ facie* presumption is, of course, wholly inapplicable here, as the facts of this case render such a construction a contradiction in terms.

Assuming that, for the purpose of the Act, these shares are to be considered, adjudged and held to have passed at the death, though they did not do so, then it seems to me that that negatives entirely the application of sec. 4, implying that the value is to be calculated as at the date of the death of the donor. The property did not pass at that time. What did pass is what the wife received on the 30th December, 1925, and it is that which is to be deemed to have passed at a later date. The increased value now set up did not pass at the earlier date but only the value of the rights as represented by those shares so here transferred. If these shares then had a par value and were, after the transfer, converted into shares of no par value, that which passed to the wife would have disappeared and there would be nothing left which would be taxable, unless it were the value of the shares at the time of transfer. Any subsequent increment, either by additional share issues or increased monetary value had not attached to them when they were handed over. Similarly if the property had been land and

the land had increased in value by reason of improvements on it or otherwise, that would not be what passed to the wife. All that she got were the shares in their then condition and at their then value. If something which did not pass at the death, but passed long previous to it, is taxable and for that purpose is deemed to have passed at the death, then it is the thing that was given and received, and only its value and its then character can be deemed to have passed at the death. We must give due weight to all the provisions of the statute, but when we are dealing with a statutory fiction which purports to tax property upon a foundation confessedly untrue, it is our plain duty not to imply consequences not explicitly provided for.

For these reasons I have come to the conclusion that sec. 4 is inapplicable and that if these shares are taxable they are taxable only at the value they had when they were transferred to the wife, if that can be or has already been ascertained in this case.

But the question whether such taxation as is covered by the Act is not in fact indirect taxation, though not really argued before us, must be dealt with. Remembering that it is not property which in fact forms property of the deceased at the time of his death, the wording of sec. 12 is important. While the word "donee" in the first line of that section would include the wife in this case, making her therefore liable for the duty, and requiring her to file a full inventory in detail of all the property of the deceased person (a rather extraordinary provision as applied to the facts of this case), subsec. 3 limits the duty of the executor or administrator, as a condition of the issue of probate, to furnish a bond conditioned for the due performance of the duty of the executor or administrator as to accounting for the succession duty for which "the property of the deceased is chargeable in default of payment being made by the persons liable therefor." This provision clearly does not include the property in question in this case, for it is not the property of the deceased, and I do not find anywhere else anything that would suggest that the estate or the executor or administrator thereof is liable to this duty. This leaves the matter in a somewhat singular position. The property sought to be taxed is not taxable under sec. 3 as a "succession." It is not property passing on the death of the deceased, nor is it property of the deceased chargeable with succession duty. Notwithstanding, however, that it is property which passed away from the deceased in his lifetime effectually, and belongs now to some one else, yet it and the original donee are held liable to taxation under an Act

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called a Succession Duty Act, and on property which in other cases might well be the subject of several intermediate transfers. For taxation such as this, it is entirely inappropriate to describe the Act as a Succession Duty Act. It is merely direct taxation on the property of some one who has no concern with the issue of the probate or the estate of the deceased. This is a species of taxation described as succession duty, but is taxation which, if adopted at all, should, as it occurs to me, be made general and not exacted as succession duty or as a duty connected with or arising out of the death of the deceased. How this particular provision found its way into an Act of this kind I cannot say; but, as the Legislature has the power to tax any property and has to my mind done so in this case, it must be left for remedy to the Legislature itself.

I would dismiss the appeal with costs.

MIDDLETON, J.A.:—I have had the privilege of reading the judgment of my brother Grant, and fully concur in the result at which he has arrived. I desire, however, to add a few words embodying the conclusions at which I have independently arrived.

In endeavouring to ascertain the meaning of an Act of Parliament, where there is any ambiguity, it is, I think, permissible to consider the object of the statute and the practical effect of attributing to it the meaning suggested by the opposing parties. If one possible construction leads to harsh and absurd results, and the other to a reasonable conclusion, the latter was probably the real intention of the Legislature. This principle, I think, is justified by the decision in *City of Toronto v. Consumers Gas Co. of Toronto* (1927), 60 O.L.R. 336.

It is to be kept in mind that the Succession Duty Act applies to all gifts *inter vivos* after the 1st July, 1892. The statute is not confined to gifts made shortly before death; and, furthermore, the statute covers every kind of benevolent gift, for sec. 6(d) only exempts from taxation property "devised or bequeathed" for religious, charitable or educational purposes, and affords no exemption from taxation of "gifts" made since the named date for these purposes.

I would illustrate the operation of the Act by several concrete instances:—

(a) A man gives to his wife at or shortly after his marriage on the 2nd July, 1892, \$100,000 cash. On his death in 1930 the wife must pay succession duty, and this duty is not upon the scale in force when the gift was made, but the very much higher rate in operation in 1930. Both parties concur in this—\$100,000 cash is

\$100,000 at all times, and the Crown does not suggest that the wife must pay succession duty upon the earnings and increment of this \$100,000 between the date of the gift and the date of the death.

(b) Instead of giving his wife \$100,000 cash, the donor gives her stock in a company of the market value of \$100,000. The wife retains this stock, and, by reason of the fact that the company does not distribute its earnings but capitalises them, and by reason of fortunate speculations during the 38 years that have passed, the stock increases in value so that at the date of the death of the testator it is worth \$500,000. The Crown contends that the widow must pay duty on the increased value; the defendants contend that duty must be paid upon the value at the date of the gift. This is the case in hand.

(c) Assume that, instead of the stock increasing in value, it had become during the 38 years absolutely worthless. For the purpose of argument, but without binding itself to the future, the Crown is ready to admit that no duty is payable.

(d) Assume a gift of stock of the market value of \$100,000 and a sale of it by the wife immediately after the gift, and that after the wife had ceased to hold it the stock had enormously increased in value, what is the right of the Crown? For the purpose of argument again the Crown now states that the Department will voluntarily forgo any claim for duty beyond that payable on the \$100,000.

(e) Assume a gift of \$100,000 in cash which the wife immediately invests in stock which increases in value, could the Crown logically claim duty on this increased value?

(f) Assume the gift of an automobile costing \$10,000 which has become worthless before the date of the death, would the Crown be content to claim no duty?

(g) Assume a gift of a young horse which became famous as a race-horse and had offspring, would the Crown claim duty upon the value of the offspring and be content with nothing if the horse died before the donor?

These illustrations, and many more that could be suggested, shew how unfair and unreasonable the contention made by the Crown is in its practical operation, and furthermore that in many cases its contention would be against the real interest of the Crown, because, as recent events well illustrate, stock does not always increase in value.

These circumstances lead me to believe that the statute may fairly be construed in such a way that sec. 8 should be regarded as

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merely bringing gifts *inter vivos* within the net spread for the imposition of taxation. Section 4 would then receive its legitimate operation by confining it to the ascertaining of the value of property actually passing at the date of death.

Another consideration which has much weight with me is that the effect of the contention put forward by the plaintiff is to impose a tax upon that which was never the property of the deceased. That which he owned and gave away was the share or shares as they existed at the date of the gift. That which it is sought to tax is the value of a corresponding number of shares as at the date of his death. What is a share in a company? It is, speaking generally, the right of a member of a company to share in the assets of a company as they exist at a particular date. The assets of this company at the date of the gift, if realised and all liabilities were paid, would yield a certain sum agreed upon by the parties. By reason of the acquisition of new assets, from whatever source, whether from capitalised earnings, successful speculations, or what not, the company now has assets, also agreed upon by the parties, having five times the value at the time of the gift. This increment and all that constitutes it was not at any time the property of the deceased. It is something that has arisen entirely after the gift and is the property of the wife and hers alone. It is as unjust to tax it as it would be to tax money that she had made by her industry and foresight and good fortune in speculations had the original gift been of cash.

MAGEE, J.A. (dissenting):—The appellant plaintiff claims that on the 30th December, 1925, William Edward Wilder gave his wife, Mary Marjorie Wilder, 500 shares in a company incorporated under the Ontario Companies Act, and died on the 28th May, 1929; that the company is a private one, and none of its shares have ever been sold or offered for sale; that the shares were given “as an immediate gift *inter vivos* (within the meaning of clause (ii) of sec. 8(2) (b) of the Succession Duty Act, R.S.O. 1927, ch. 26, and amendments),” and that the value of the said shares at the date of such gift was \$50,240 and the value at the date of the death of the said William Edward Wilder was \$264,153.50. All this is admitted on the pleadings by the defendant trust company, the executor of Mr. Wilder’s will, and by the co-defendant, his widow. Upon the strength of these admissions the plaintiff asks a declaration that the date as at which the value of the shares should be taken for purposes of succession duty under the Succession Duty Act is the 28th May, 1929, and not the 30th

December, 1925, and that the Province is entitled to recover succession duty in respect of the value so fixed. The defendants do not deny that the Province is entitled to duty, but they say that the value should be taken as at the 30th December, 1925, the date of the gift, and not as at the date of the death. The judgment appealed from declares that for the purposes of the Act the shares are to be valued as of the 30th December, 1925.

There is no suggestion that the gift was made in contemplation of the death of the donor or for the purpose of avoiding succession duty, or that it was not an absolute one made *bonâ fide* and taking immediate effect. The "aggregate value" of Mr. Wilder's estate does not appear. There is no evidence or indication how the increase in value of the shares has been caused. It may have been from accumulated undistributed profits, or from improvements by others in properties adjoining the company's properties, or from the acquirement of a valuable invention or discovery of ore on its land, or the falling in of a prior life-estate, or from the business ability of new management perhaps of the donee, or from a score of other causes outside of inherent original value, and not omitting possible payments by shareholders of calls on stock or contributions for development between the two dates in question. Also a donee might well have parted with the property before any increase in value.

The plaintiff bases his contention on three provisions in the Succession Duty Act: (1) By subsec. 1 of sec. 8, all property and any income therefrom passing on the death of any person, as well as all other property subject to succession duty upon a succession, shall be subject to duty. (2) By subsec. 2 of the same section 8, property passing on the death is deemed to include ((b) (ii)) any property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos* made since the 1st July, 1892. (3) By sec. 4, in determining the dutiable value of property or the value of a beneficial interest in property, the fair market value shall be taken as at the date of the death of the deceased, and allowance shall be made for reasonable funeral expenses, debts and encumbrances, and Surrogate Court fees. Therefore, it is claimed, these shares, being taken as a gift *inter vivos* after 1892, are deemed to be property of the donor passing on his death in May, 1929, and so subject to duty, and their dutiable value is the fair market value at that time.

It may here be noticed that by para. (i) of subsec. 2 of sec. 8 property passing on the death is likewise deemed to include any

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property transferred since the 1st July, 1892, for partial consideration paid to the transferor to the extent to which the value of the property so transferred exceeds the value of the consideration paid. Also it is to be noted that by subsec. 3 of sec. 8 no duty shall be payable in respect of any property given (as these shares were given) more than three years before the death, if given to the father, mother, child, son-in-law, or daughter-in-law of the donor, to the value or amount of \$20,000 in the aggregate among all of them. This exception does not exempt from duty a gift to a wife—but clause (b) of the same subsec. 3 exempts gifts to any one not exceeding \$500. Neither of these provisions would reduce the duty in favour of Mrs. Wilder, but they serve to accentuate the liability to duty of gifts not falling within them.

The value of property passing on death is to be ascertained for two purposes under sec. 9, which imposes rates of duty varying from 1 to 35 per centum with the aggregate value of the property and additional rates varying from  $1\frac{1}{2}$  to 13 per centum with the value of the property passing to any one person of those of different degrees of relationship. Besides sec. 4 already quoted, two other sections refer to the date for valuation. Section 12(1) requires the filing of a sworn statement in detail by an heir, legatee, donee or other successor, and every person to whom property passes for any beneficial interest, of all property of the deceased person, and the fair market value thereof on the date of his death, and sec. 13 empowers the Surrogate Court Judge to direct an appraisement by the sheriff, who is to appraise at the fair market value at the same date. But these two sections only refer to an inventory of the property of the deceased, though sec. 12 requires a legatee or donee to file one.

It is manifest that property given might be worth much less at the time of the death than at the time of the gift. Timber on woodland might have disappeared, a gold mine might have had all its ore withdrawn by the donee, the location of a city lot have become less desirable, a building have been damaged or destroyed by fire, or a leasehold or an annuity wholly or nearly terminated, or a company might have become bankrupt. In some of such cases the donee may before the death have actually realised from the property more than the fair market value when given to him. The Legislature, therefore, in fixing any date for valuation, made the Province as well as those to whom property passed take a chance which might result favourably or to the contrary—and the fact that in this case or in any other it may seem to bear unduly heavily

is no reason for giving the words of the Legislature other than their fair construction, as required by sec. 9 of the Interpretation Act, although in this case they are part of an Act imposing taxation and so to be carefully scrutinised. The definitions of "aggregate value," "dutiable value," and "passing on the death," in sec. 1 of the Succession Duty Act, do not help in the present case. The definition therein of the word "property" is, I think, one of property in general and not limited to dutiable property, although it can hardly be said that property which has been given away by the owner is capable of the qualification of being devised or bequeathed by him or of passing on his death to his heirs or personal representatives. Nor does this gift *inter vivos* or the subsequent death of the donor confer a "succession" under sec. 3. We are left to the other provisions of the Act already mentioned.

It was not until 1919 (by 9 Geo. V. ch. 9, sec. 1) that this wide special provision for taxing gifts made at any time since the 1st July, 1892, was enacted. The Act of 1914 (4 Geo. V. ch. 10, sec. 5) may have been intended to have the same effect, but (by omitting a previously repeated word, "property"), failed to apply to gifts where immediate and exclusive enjoyment was had by the donee. It might not unfairly be argued that in bringing in this new class of property, which for years did not belong to the person dying, the pre-existing provision that property passing should be valued as at his death could not be intended to apply and therefore did not apply. It is well, therefore, to look at the then existing law.

The original Succession Duty Act of 1892 (55 Vict. ch. 6, sec. 4) made subject to duty (save certain exemptions) all property passing by will or intestacy or any interest therein or income therefrom which should be voluntarily transferred by deed, grant, or gift made in contemplation of the death of the grantor or bargainor, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or by reason whereof any person should become beneficially entitled in possession or expectancy to any property or the income thereof. It may be a question whether the gift here in question would not be covered by the latter part of this section. At all events there was made subject to duty property which had ceased to be property of the donor and property which at his decease formed no part of his estate.

This was re-enacted in 1896 by 59 Vict. ch. 5, sec. 4(1), which added property taken as a *donatio mortis causâ*. Here again the

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property would have passed from the donor subject to revocation by him and would form no part of his estate. While declaring in clause 8 that the generality of the words re-enacting the section of 1892 was not to be restricted, that amendment of 1896 also made dutiable gifts *inter vivos* taking immediate effect, not made *bonâ fide* more than 12 months before the donor's death, and included gifts, whenever made, of property of which the donee had not assumed and retained *bonâ fide* enjoyment to the exclusion of the donor, and settlements reserving to the settlor life-interests or power of reclaiming. Here then again was included property not belonging to the donor and forming no part of his estate. It also included transfers to joint ownership and purchases of annuities where survivorship would cause the property not to belong to the estate of the deceased.

That Act of 1896, in secs. 3 and 4 (amending the Act of 1892), authorised a valuation by the sheriff of the fair market value of property mentioned in or omitted from the executors' or administrators' inventory, and the Surrogate Registrar was to fix the "cash value at the date of the death" of all estate interests, annuities, and life-estates or terms of years "growing out of the estate." But this would hardly apply to dutiable property not forming part of the estate, as there was not then any provision that such property was to be deemed passing on the death, and the inventory was only to be of all the property of the deceased—and it would seem that the Registrar's power was only to apportion, as at the date of the death, the value of any item or items of property among the various interests therein, so that the duty on each interest would be ascertained.

It is to be noted that these Acts of 1892 and 1896 directly declared that these properties which had passed from the deceased before his death were subject to succession duty, while the present Act (in sec. 8) only declares that they are to be deemed to be included for all purposes of the Act in property passing on the death, and declares that all property passing on the death and all other property subject to succession duty upon a succession shall be subject to duty. The Acts were consolidated in R.S.O. 1897, ch. 24.

In 1907 the various enactments were consolidated by 7 Edw. VII. ch. 10, which in sec. 2 declared that duty should be levied upon all property "passing on the death" of any person dying thereafter, "according to the fair market value of such property at the date of the death of such person." The words "passing on the

death" were (in sec. 3) defined, as in the present Act, as meaning "passing immediately on the death or after an interval." By sec. 4, which corresponds with sec. 4 of the present Act, in determining dutiable value the value shall be taken as at the "date of the death of the deceased." Section 6 followed the Act of 1896 in directly declaring that the specified classes of property to be subject to duty include the specified *ante mortem* gifts—and it added, in subsec. 2(b), that any property within the meaning of the specified classes of dispositions should for all purposes of the Act be deemed to pass on the death. Then, by sec. 7(2), every person to whom for a beneficial interest property not included in the executors' or administrators' inventory passed, was made accountable for the duty.

This Act therefore clearly said not only that property passing on the death should be dutiable, but also that these specified past dispositions and gifts should be dutiable, and that the dutiable value was to be taken as at the death, and also finally that for all purposes of the Act they should be deemed to pass at the death.

In 1909 was passed another consolidating Act, 8 Edw. VII. ch. 12, which (sec. 24) declared the law since the 1st July, 1892. So far as is here important, it remodelled the Acts substantially in the shape they were in R.S.O. 1914, ch. 24, when the Act of 1914 already referred to was passed, followed by the Act of 1919, which first made the shares here in question clearly dutiable.

I have referred at length to this antecedent legislation to shew that, from the first imposition in 1892 of duty, some property which had been disposed of by the owner in his lifetime and which forms no part of his estate was made dutiable, and that in 1896 when several classes of such cases were added, and in four subsequent consolidations since then, the date of death was expressly stated to be the date for valuation, and in the wording of the Act of 1907 such property should be deemed to pass on the death. I see no escape from the conclusion that up to 1919 the date of death was the only date to be considered for valuation of the dutiable properties, even though forming no part of the estate of the deceased. There was no attempt to interfere with the owner's right to dispose of his property or to restore it to his estate.

Then the addition in 1919 of the class of gifts such as here in question was no change in principle, but merely extended the limit of an already large pre-existing list of *ante mortem* dispositions; and, made as it was merely by re-arrangement of one clause of a subsection, it gives no warrant for segregating one class in the list from the provision which clearly applies, as I think, to all the

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App. Div. others. Therefore, in my view, the property given should be  
 1931. valued as of the date of the donor's death, that is of the 28th May,  
 ——— 1929. The case cited for the plaintiff, *Lord Strathcona and*  
 ATTORNEY- *Mount Royal v. Commissioners of Inland Revenue*, [1929] Sc.  
 GENERAL L.T.R. 249, 629, at least does not oppose this view.  
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 v.  
 NATIONAL As the tax is to be paid by the donee and in respect of the gift,  
 TRUST CO. it can hardly be called other than direct taxation, although he  
 LTD. has the advantage of a possible though uncertain postponement of  
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 the amount and the uncertainty of the aggregate value of the  
 donor's estate. After all, if the tax has increased, it is only  
 because the donee's good fortune has increased much more.

But it does not necessarily follow that the so-called market value of shares in 1929 should be the dutiable value, nor even the market value, of the shares given. Property given in 1925, while bearing the same name in 1929, is not necessarily the same property. If land given in 1925 was built on by the donee it does not follow that the market value of the land improved is the market value in 1929 of that which was given three years previously. So with shares. Shares unpaid or partly paid in 1925 may have been increased in value, as I have said, by payments by the donee. Other causes not arising from inherent value of the shares or from mere rise or fall in the price of commodities or securities, as they stood in 1925, may have occasioned the increased market value in 1929. Unless the parties agree, there should be a reference to ascertain what has caused the very great difference in value in this case. If it arose solely from accumulation of profits subsequent to the gift, or application of declared dividends to pay up shares, questions may arise from the wording of the Act which it is premature to discuss. Section 8 in subsec. (1) mentions as dutiable all property (as therein) and any income therefrom. Clause (a) of subsec. (2) also mentions any property or income, while clause (b), here in question, does not mention income.

I would therefore be in favour of allowing the appeal and declaring that the dutiable value is to be ascertained as at the date of the death, but reserving the question of what was to be valued and what was such dutiable value until the reference suggested is reported on.

The appellant should, in my view, have the costs of the action to judgment and of the appeal, but the costs of the reference and further costs should be reserved.

*Appeal dismissed (MAGEE, J.A., dissenting).*

## [APPELLATE DIVISION.]

REX V. CRAINGLY.

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March 9.

*Criminal Law—Obtaining Goods by False Pretences—Criminal Code, secs. 404, 405—Title—Possession—Property—Fraud Practised upon Bailee—Special Property in Goods—Intent to Defraud.*

Upon a charge of unlawfully obtaining goods from F., by false pretences, with intent to defraud, contrary to sec. 405 of the Criminal Code, the defendant was convicted by a police magistrate. F. was not the owner of the goods, but the bailee for a special purpose:—*Held*, by the majority of the Court, on appeal from the conviction, that when the defendant, by fraud, with intent to obtain the goods from F., induced him to part with them, he deprived F. of the special property in them which he had as bailee, as well as of the possession thereof, and was rightly convicted.

*Rex v. Deakin and Smith* (1800), 2 East's P.C. 653, and *Rex v. Harding* (1929), 46 Times L.R. 105, followed.

*Per MIDDLETON, J.A.*:—The defendant was guilty of the offence because he obtained goods by false pretences when he obtained possession of them, even though he acquired no title to them. The doctrine that an accused person is not guilty of this particular offence unless he obtains title as well as possession is not defensible, for the fraud practised by the accused prevents the property passing.

*Per MAGEE, J.A.* (dissenting):—Upon the evidence, the property in the goods was in the defendant, and neither G., who had done work upon the goods for the defendant, nor F., G.'s bailee, had any right except to hold them until a sum of money was paid. The defendant paid that sum, and, if G. or F. refused to give them up, could have replevied them—there could be no intent to defraud when the defendant obtained his own goods by paying everything lawfully owing in respect of them.

AN appeal by the defendant from his conviction by one of the Police Magistrates for the City of Toronto for that he (the defendant) did unlawfully obtain eight pairs of trousers from Thomas Fisher, by false pretences, with intent to defraud, contrary to sec. 405 of the Criminal Code.

January 28. The appeal was heard by MULLOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

*J. C. McRuer, K.C.*, for the appellant. The test here is whether the property in the goods or merely possession was obtained. If possession only was obtained, the offence can only be larceny by a trick: *Regina v. Kilham* (1870), L.R. 1 C.C.R. 261; Tremear's Criminal Code, 4th ed., p. 525. The appellant could obtain merely possession of the goods, as they already were his property. Even if possession was obtained by a trick, he got nothing more than he was entitled to, because he actually paid \$20, which was more than the amount of the charge for the work done on these particular goods: *Rex v. Williams* (1836), 7 C. & P. 354; *Rex v. Scheer*

App. Div. (1922), 39 Can. Crim. Cas. 82; *Rex v. McManus* (1923), 42 Can.  
 1931. Crim. Cas. 248. The lien of the complainant on the goods in  
 REX question was not a general one, but was limited to the amount of  
 v. the work done on these particular goods, as the account between  
 CRAINGLY. the complainant and the appellant was payable by the week: *Al-  
 bemarle Supply Co. v. Hind & Co.*, [1928] 1 K.B. 307; *Raitt v.  
 Mitchell* (1815), 4 Camp. 146; Halsbury's Laws of England, vol.  
 19, p. 12.

*W. B. Common*, for the Crown. The charge is obtaining the goods from Fisher, the driver, who, as bailee, had a special property in the goods against everybody. The trick was carried out with the intention to defraud. The right of Fisher to possession of the goods has been violated by false pretences: *Rex v. Harding* (1929), 46 Times L.R. 105; *Rex v. Deakin and Smith* (1800), 2 East's P.C. 653. The question of a lien does not affect the charge of obtaining the goods from Fisher.

March 9. GRANT, J.A.:—This was an appeal from a conviction registered by R. J. Brown, Esq., Police Magistrate at Toronto, on the 29th December, 1930, and also against the sentence of 30 days' imprisonment, in respect of a charge against the accused that he did "on the 20th day of December in the year 1930, at the city of Toronto, in the county of York, unlawfully obtain eight (8) pairs of 'gents' trousers from Thomas Fisher by, false pretences, with intent to defraud, contrary to the Criminal Code, section 405, in such case made and provided." The accused elected to be tried summarily and pleaded not guilty. The evidence was taken verbatim in the usual manner and the accused was convicted of the offence charged against him and committed to gaol for 30 days.

The definition of false pretences is to be found in sec. 404 of the Criminal Code and reads as follows:—

"A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation."

The penalty is provided for by sec. 405, which reads as follows:—

"405. Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretence, either directly or through the medium of any

contract obtained by such false pretence, obtains anything capable of being stolen, or procures anything capable of being stolen, to be delivered to any other person than himself."

The relevant facts are briefly as follows. One Goodman was a working tailor in Toronto, and undertook to manufacture trousers for the accused out of material which the accused was to and did furnish. The business relations between the two continued for some little time, and in the course of the same a company named Strand Tailors Limited, with which the accused was identified, and for which work of a similar character was being done by Goodman at the request of and upon the credit of the accused and one Garshon, became indebted to Goodman in the sum of \$43 or \$44, which was not paid. In the week preceding the 20th December, Goodman made up further materials, the property of Craingly and Garshon, for which he was entitled to payment of a further sum of approximately \$16 (the exact amount was not stated definitely by Goodman in his testimony). This sum was in respect of the 8 pairs of trousers mentioned in the information. The parcel containing these trousers was handed by Goodman, or by some one of his employees, to one Thomas Fisher, a cartage agent in Toronto, with instructions that the parcel was to be delivered by him to Craingly, the accused, upon payment of the sum of \$63.50. The instructions to Fisher, sworn to by him, were that he was to collect the sum of \$63.50 from Craingly, or he was to bring the parcel back. Fisher delivered the parcel at Craingly's premises, but Craingly would not pay the amount, and Fisher therefore, or his driver, brought the parcel back. Subsequently Fisher received a telephone message, purporting to come from Goodman, instructing him to release the parcel upon payment of \$20, not \$63.50 as his instructions had previously been. The person who spoke over the telephone stated that he was Mr. Goodman, and Fisher accepted the statement in good faith and acted upon it, delivering the parcel to the accused Craingly, pursuant to the instructions received over the telephone, upon payment by Craingly of the sum of \$20. Subsequently Goodman demanded the \$63.50, and, upon its being stated to him that he had given subsequent instructions for the delivery of the parcel upon payment of \$20 only instead of \$63.50, he repudiated having given any such instructions, and Fisher was informed that some person had perpetrated a fraud upon him. Evidence was given before the magistrate which, if believed, was amply sufficient to justify his con-

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App. Div.      clusion that the fraud was perpetrated by the accused Craingly.  
1931.      As a matter of fact Fisher in his testimony stated that he went to  
    see Craingly about it, and that, at first when he asked him if he was  
    the Mr. Craingly who ran the store in Yonge-street, he denied it.  
    v.      However, Goodman was with Fisher and identified Craingly.  
CRAINGLY.      Fisher then said to him, "You are the man who 'phoned as Mr.  
Grant, J.A.      Goodman and signed this sheet?" and he said, "I admit it."  
    Fisher stated that the sheet to which he referred was the receipt  
    in the receipt-book.

The magistrate, who heard the witnesses, stated explicitly that he did not believe the story told by Craingly, and he believed the evidence of Fisher, which he described as being most reliable.

The only ground pressed upon us by counsel for the appellant upon the argument of the appeal was to the effect that the charge ought to have been one of "larceny by a trick," under another section of the Code, and not the obtaining of goods by false pretences. The reason put forward was that in this case the accused, if the evidence for the Crown be accepted, did not obtain the property in the goods but merely the possession of the latter, as a result of the fraud practised upon Fisher. It was argued that the materials which were worked into the trousers were the property of Craingly and that he was merely getting his own property, and that, if he perpetrated a fraud, he thereby merely acquired possession wrongfully, which would be larceny, and not an obtaining by false pretences. For this proposition of law numerous decisions of the courts of other Provinces in Canada were cited; and, if this Court were to accept the law as laid down in such decisions as being applicable to the facts of the present case, the appeal would probably be successful. However, in the view which I take of the matter, a decision of that question for the courts of this Province is not necessary in the present case.

The law is very clear that, if any property were parted with as a result of the fraud practised by the accused, the charge of obtaining by false pretences would lie, even though the facts might also justify the laying of a charge of larceny or theft.

It is to be noted that the charge here laid was that of obtaining the goods by false pretences from Fisher, the carrier, to whom they had been given for a special purpose, namely, in order that they might be delivered to Craingly upon payment of a certain sum of money. Fisher was therefore a bailee of the goods,

and, as such, he was possessed of a "special property" in the goods so entrusted to him.

"Property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of bailment, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered; for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away; the bailee, on account of his immediate possession; the bailor, because the possession of the bailee is, immediately, his possession also. So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledger and pledgee have a qualified, but neither of them an absolute, property in them" (2 Blackstone's Commentaries, pp. 395-6).

"In all these instances (bailments) there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property . . . . And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels" (p. 453).

"Every bailee has a temporary qualified property in the things of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger who may damage or purloin them" (Jones on the Law of Bailment, 4th ed., p. 80).

"Every person to whom the general owner of a movable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein" (Stephen's Digest of the Criminal Law, 6th ed., ch. 34, art. 307).

See Beal on Bailments, pp. 38 to 42, where the subject is discussed and the above authorities, *inter alia*, are cited.

"Any one who has a special property in goods stolen may lay them to be his in an appeal or indictment for larceny; as a bailee, pawnee, lessee for years, carrier, or the like" (2 East's P.C. 652).

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In *Rex v. Deakin and Smith*, referred to in 2 East's Pleas of the Crown 653, it was held that goods which had been sent by a tradesman in London to Mr. Broderick, at Spalding, by the Spalding coach, and were stolen by the prisoners out of the coach, "were properly laid to be the property of Markham, who was not the owner, but only the driver of the coach; there being no contract between him and the proprietors, that he should be liable for anything stolen; and it not appearing that he had been guilty of any laches. The case being referred to the Judges, it stood over for some time; but finally the conviction was holden right; the coachman having the possession, and a special property in the goods committed to his charge."

The authority of this decision was once more affirmed as recently as November, 1929, by the Court of Criminal Appeal in England in *Rex v. Harding*, 46 Times L.R. 105, where, upon the above authority, it was held by the Court that a servant in whose charge her master's belongings had been left had a special property therein.

The existence of such a special property in bailees is recognised and affirmed in Archbold's Crim. Pldg., 27th ed., at the bottom of p. 45 and top of page 46, where the various cases are referred to.

See also in the 7th edition of Russell on Crimes, vol. 2, at pp. 1286 and 1288 to 1290.

In the present case, Fisher was the bailee of the goods in question for a special purpose, and, as such, he had a special property in those goods. When therefore the accused by fraud, with the intent to obtain the goods from Fisher, induced him to part with the goods, the accused thereby deprived Fisher of his special property in the goods, as well as of the possession of the same, and was rightly convicted of the offence of obtaining by false pretences. In my opinion, therefore, the magistrate having disbelieved the evidence of the accused, and having believed and relied upon the testimony of Fisher and Goodman, the conviction for false pretences was right and should be affirmed. There does not appear to be any sufficient reason for interfering with the sentence. The appeal must therefore stand dismissed, and the conviction affirmed.

MULOCK, C.J.O., and HODGINS, J.A., agreed with GRANT, J.A.

MIDDLETON, J.A.:—I concur in the dismissal of this appeal, but I hesitate to concur in the reasons expressed by my brother Grant. It appears to me that where a carrier is spoken of as having a special property in the goods entrusted to him, the statement may be too wide, and that where the goods are placed in his possession by one, other than the owner, and without any authority emanating from the owner, and against his will, the carrier may not, as against him, have any property whatever.

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Middletton,  
J.A.

I much prefer to base my judgment upon the ground that the accused is guilty of an offence because he obtains goods by false pretences when he obtains possession of the goods, even though he acquires no title thereto. There are, I am aware, decisions in other Provinces to the contrary effect. They seem to indicate that the accused is not guilty of this particular offence unless he obtains not merely possession but title to the goods. I do not believe this is a defensible doctrine, for the fraud practised by the accused prevents the property passing.

I forbear any elaborate discussion of the question involved, as the majority are of the opinion that the appeal fails, and it makes little difference upon what ground an individual member of the court bases his decision.

MAGEE, J.A. (dissenting):—Eddy Craingly appeals from his conviction by a police magistrate, on summary trial at Toronto, on a charge that on the 20th December, 1930, at Toronto he unlawfully did obtain eight pairs of "gents'" trousers from Thomas Fisher, by false pretences, with intent to defraud.

Craingly and his partner Garshon had business premises on a flat in Yonge-street for the sale of clothing. One Goodman and a partner make up clothing elsewhere in Toronto. To them Craingly was in the practice of sending cloth and materials to be made into trousers. Goodman, the prosecutor, being asked, "There is a certain amount of work done each week that you charge him for at the end of the week?" answered, "Yes."

"Q. Was there an old account owing to you by the firm of the Strand Tailors Limited amounting to \$43 or \$44? A. Yes.

"Q. And had you arranged with Mr. Craingly that this old account was to remain a balance and they were to pay you off so much a week on account of it? A. It was not arranged, but it was going on that way.

"Q. They were to pay you off gradually? A. Yes, sir."

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In the week ending on Saturday the 20th December Craingly had sent Goodman the materials to be made up into the trousers, the subject of prosecution. They had been made up, and that Saturday morning Goodman sent them in a parcel to the office of Thomas Fisher, a cartage agent, with instructions to deliver them at Craingly's premises and collect \$63.50 or bring the parcel back. The parcel was taken by Fisher's driver to Craingly's, and the driver saw some man there, not Craingly, but did not get the money and took the parcel back to Fisher's. Soon afterwards a telephone message was received there to ring up a telephone number which is shewn to be Craingly's. The driver did so and was asked about the parcel, and "Did they take it?" and he said, "No, they did not pay for it and I brought it back." Fisher's clerk says, "Shortly afterwards Mr. Craingly came up and asked me where he could get hold of Mr. Goodman and I gave him his address." Later during the day, a telephone message was received by Fisher's office purporting to be from Goodman to deliver the parcel on receipt of \$20, leaving a balance of \$43.50, and subsequently Craingly called and paid \$20 and received the parcel and signed a receipt for it. Soon afterwards Goodman telephoned Fisher's office, and on being told what had occurred said he had not telephoned to deliver the parcel for less than \$63.50. The prosecution alleges that it was Craingly who telephoned in Goodman's name and by that false pretence obtained the goods. Craingly swears that he did not do so. He says he was out when Fisher's driver called with the parcel, but that his partner spoke to the driver. He admits that their reason for not paying \$63.50 for the parcel was that they did not have it. He says he tried to get in touch with Goodman and left his own telephone number at Fisher's office in case Goodman should come in. After being out of his own office later on he was told that some one had telephoned from Goodman that he should get the parcel on paying \$20, and then he went and got it. That evening Fisher and Goodman went to Craingly's house and Fisher swears that he said to Craingly, "You are the man that 'phoned as Mr. Goodman and signed this sheet?" (the receipt for the parcel), and that Craingly said, "I admit it." Craingly denies being asked or told about telephoning and says he was only asked if he was the man who got the parcel and signed the receipt. Goodman who was present was not asked to corroborate Fisher. He was asked if there was a possibility that one of the employees of his firm had telephoned to Fisher's and

answered "No"—but this followed:—

"Q. Would it be your partner? A. I would not swear he did not as far as that goes.

"Q. You did not speak to your partner about it at all? A. No, sir, I did not.

"Q. It might have been possible that he 'phoned? A. It is possible. I would not swear that it was not."

No one was called for the defence to shew even that any such telephone message as Craingly speaks of was received, purporting to come from Goodman, about paying only \$20—and, although the only evidence of Craingly having personated Goodman is Fisher's uncorroborated statement of an improbable admission, I do not think the Court would be justified in disturbing the magistrate's finding that Craingly obtained the goods by false pretences.

But then comes the really important question, was it done with intent to defraud? That intent is the gravamen of the charge and of the section of the Criminal Code. We must go back to the evidence again.

Craingly was asked, "There was an old account that your firm owed Mr. Goodman amounting to how much? A. About \$39.

"Q. What arrangement was made with Mr. Goodman regarding this account? A. That we were to pay him something upon it every week, besides the work that he was doing.

"Q. During the week of the 20th December, what amount of work had you sent out to Mr. Goodman? A. There were 9 pairs of trousers, amounting to \$14.

"Q. Your arrangement with him was that you were to pay him at the end of the week? A. Yes."

I have already quoted Goodman's evidence to the like effect. His statement that the old debt was owing by "Strand Tailors Limited" would hardly point to any legal liability of Craingly, but that is of no importance. His examination proceeds:—

"Q. When you applied the old balance of \$43 on the amount of work you had done for the week—\$14 or \$15—then you sent down the driver to collect the whole amount? A. Yes, sir."

It may be conceded that the arrangement admitted by Goodman that he was to be paid at the end of the week for the week's work would not deprive him of his lien for the price of the work while he still held the goods—and that Craingly could not obtain the trousers without paying the \$14. But Goodman had no right or pretence of right to hold them until the old debt was paid also.

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 1931. arrangement that the old debt would be paid gradually. Craingly  
 REX was entitled to the goods upon payment of the \$14, no matter in  
 v. whose hands they were. The property in the goods was in  
 CRAINGLY. Craingly, and neither Goodman nor Fisher for him had any right  
 Magee, J.A. except to hold them till \$14 was paid. If they had refused to give  
 them up, Craingly could have replevied them. He paid all they  
 were entitled to and \$6 more on account of the old debt which they  
 could not hold the goods for. How it can be said that there was  
 any intent to defraud when the law would give him the goods, I  
 confess myself at a loss to understand. I wish to make it clear  
 that I admit that the offence may be committed although the per-  
 son defrauded is only deprived of the possession of the goods, and  
 although there is no attempt to deprive any one of the property  
 in them—but how there can be an intent to defraud when a man  
 obtains his own goods by paying everything lawfully owing against  
 them, I can only regret my own inability to comprehend.

I would allow the appeal and quash the conviction.

*Appeal dismissed (MAGEE, J.A., dissenting).*

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[APPELLATE DIVISION.]

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March 9. *Criminal Law—Theft of Post-letters—Confession—Admissibility in Evi-  
 dence—Statement Made to Accused by Police Officer—Inducement  
 to Make Confession—Whether Confession Made before or after  
 Statement—Question to be Submitted to Jury—Evidence.*

Upon appeal from the conviction of the defendant for stealing post-  
 letters from a post-office, the main ground of appeal was that a  
 certain alleged admission or confession of the defendant was im-  
 properly admitted in evidence; and it appeared that a police officer  
 to whom the confession was said to have been made had said to  
 the defendant that "it would be better to tell the truth:"—

*Held*, that the use of such an expression to an accused person imports  
 the probability of benefit to be derived by the accused from telling  
 the truth about the matter; and, therefore, any statement made by  
 the accused, after such an expression had been used to him to induce  
 him to make a statement, would not be admissible in evidence  
 against him.

But *held*, by the majority of the Court, that the material statements  
 or admissions of the defendant here were made before the use of the  
 objectionable expression by the police officer; and the conviction  
 was affirmed (MAGEE, J.A., dissenting).

*Per* MAGEE, J.A.:—While it is the right of the Court to decide prim-  
 arily on the admissibility of a confession, it is for the jury to deter-  
 mine ultimately whether such confession was voluntary; if there

is a conflict of evidence and the Court is not satisfied that the confession was voluntary, it should submit the confession to the jury, with instructions to disregard it, if upon all the evidence they believe that it was involuntary. That course was not adopted here; the statement admitted upon contradictory evidence was pressed upon the jury, and must have prejudiced them in considering the prisoner's allegation of innocent possession of the letters; and there should be a new trial.

AN appeal by the defendant from his conviction at the General Sessions of the Peace for the County of Carleton for stealing seven post-letters from the Ottawa post-office, in which he was employed as a sorter.

February 12. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*V. S. McClenaghan*, for the appellant. Certain admissions alleged to have been made by the appellant were improperly admitted as evidence. The alleged confession was made by him after an inducement by a police officer, who stated to the appellant: "You have been under suspicion for some time. You had better tell the truth and get the whole matter cleaned up." Some of the witnesses swore that the inducement was made to the appellant before he made the alleged confession, while others stated that the inducement was not made until after the accused had made the admissions. The trial Judge did not point out to the jury this discrepancy in the evidence as to the proper sequence. Reference to *Regina v. Bate* (1871), 11 Cox C.C. 686; *Regina v. Fennell* (1881), 7 Q.B.D. 147; *Rex v. Partridge* (1836), 7 C. & P. 551; *Rex v. West* (1925), 57 O.L.R. 446, 449; *Regina v. Jarvis* (1867), L.R. 1 C.C.R. 96.

*I. A. Humphries*, K.C., for the Crown. The words used by the police officer constituted an inducement to the accused to tell the truth. But the evidence clearly shews that the admissions were made before the inducement was made to the accused to tell the truth, and therefore they were not improperly admitted as evidence.

March 9. The judgment of the majority of the Court (by direction of the Chief Justice) was read by GRANT, J.A.:—This was an appeal from the conviction of the accused at the General Sessions of the County of Carleton, registered on the 3rd December, 1930, upon the first count of an indictment, that he "did unlawfully steal seven post-letters from a post-office, to wit, Ottawa general post-office, the property of the Postmaster-General of Canada," upon

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App. Div. which conviction the accused was sentenced to three years' im-  
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REX The only substantial ground of appeal, as urged upon us, was  
v. that certain alleged admissions on the part of the accused were  
BROWN. improperly admitted in evidence, "in view of the fact that an  
Grant, J.A. inducement to make the same had been made to him by a police  
officer."

The evidence given by McDonald, the police officer, was to the effect that at a certain stage of the conversation had with the accused on the occasion in question, he, McDonald, "told the accused that he had been under suspicion, and that it would be better for him to tell the truth to Mr. Low, and get this matter cleared up."

As stated by McDonald in the police court apparently, as used by counsel for the accused on cross-examination, the statement was, "You have been under suspicion for some time and it would be better to tell the truth to Mr. Low and get the whole matter cleared up." The difference between the two statements, that is the statement as given by McDonald in the witness-box on his trial, and the statement as given by him at the preliminary hearing in the police court, was that as given by McDonald at the trial he inserted after the word "better" the words "for him," which words were not given by him in the evidence in the police court.

In view of the decisions of appellate courts dealing with the admissibility of admissions or confessions obtained after the use of the expression "it would be better to tell the truth," it does not appear to be very material whether the words "for you" or "for him," referring to the accused, were used or not.

In a long line of decisions of courts of criminal appeal the use of such an expression to an accused person has been frowned upon as importing the probability of benefit to be derived by the accused from telling the truth about the matter. In other words, the courts have deduced from the use of such an expression an intimation to the accused that it would be to his advantage to tell what he knew about the matter, and, therefore, any statement made by the accused, after such an expression had been used to him to induce him to make a statement, would not be admissible in evidence against him.

Where the prosecutor said to the prisoner, "I should be obliged to you if you would tell us what you know about it, if you will not, we of course can do nothing," it was held that this was such an

inducement to confess as would exclude what the prisoner said in reply: *Rex v. Partridge*, 7 C. & P. 551.

Where a witness said to the accused, "It would have been better if you had told that first," it was held that this was an inducement to confess, and a statement made in response thereto was inadmissible: *Rex v. Walkley* (1833), 6 C. & P. 175.

Where the constable said to the accused "It might be better for you to tell the truth and not a lie," it was held that the statement of the accused made thereafter could not be received: *Regina v. Bate*, 11 Cox C.C. 686 (Montague Smith, J.)

Where the statement to the accused was, "You had better tell all you know," the statement of the accused made subsequently was excluded: *Rex v. Kingston* (1830), 4 C. & P. 387.

Where the prosecutor said to the prisoner, "The inspector tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you," it was held by the Court (Lord Coleridge, C.J., Grove, Hawkins, Lopes, and Stephen, JJ.) that the confession was not admissible in evidence: *Regina v. Fennell*, 7 Q.B.D. 147.

Numerous cases were cited in the argument for the prisoner, some of which are given above, and reference was made to the statement of Kelly, C.B., in *Regina v. Jarvis*, L.R. 1 C.C.R. 96, to the effect that the words "you had better" seem to have acquired a sort of technical meaning, that they held out an inducement or threat within the rule that excludes confessions.

The law therefore appears to be well settled that any statement or alleged confession or admission, made by the accused after the use to him of the expression "it would be better" to tell the truth, etc., would not be admissible in evidence.

A more difficult question then arises, namely, whether or not the material statements or admissions of the accused were made before or after the use of the above objectionable expression by the police constable.

Counsel for the accused insists that any statement or admission by the accused, which was in the nature of a confession, or would serve as a substantial ground for a verdict of guilt, was made after the use of the objectionable words and not before.

The evidence of the prosecution in regard to the statements of the accused was given by three witnesses—Duguay, an inspector of postal service, Low, district superintendent, and McDonald, a detective.

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Duguay first talked with the accused and told him he was looking for a certain letter addressed to one Percival. The accused said he did not know anything about it. Duguay asked, "Are you sure?" and asked him certain other questions as to his having been at work at the post-office that night, etc. Then Duguay said to him, "Are you quite sure you don't know anything about this letter?" and testifies that "thereupon he (the accused) got up and pulled a bundle out of his left hand pants' pocket and placed them on the ledge of the desk." The bundle consisted of the seven letters which the accused was charged with having stolen. These letters were produced and identified at the trial and among them was the letter to Percival.

Duguay states that after the production of the letters he called Mr. Low and told him that the letter about which he had been inquiring had been produced by the accused. He testifies that "Mr. Low asked the accused what he was going to do with the letters, and Brown didn't reply, but sort of mumbled something, and he repeated the question, 'What were you going to do with the letters, Brown, take them home?' and he said 'I suppose so.' With that Mr. Low called in Mr. McDonald, who asked Mr. Low if the usual warning had been given to Mr. Brown (the accused), and Mr. Low said it hadn't been, and then Detective McDonald read the usual warning to him." Duguay further testifies that he (Low) "also asked Brown if he had ever taken letters before, and he said no." The jury then retired, objection having been taken by counsel for the accused, and the examination of Duguay continued, regarding the conversations. Duguay said his only recollection of what McDonald said to Low was regarding the giving of the warning, and he states that, according to his recollection, McDonald did not say anything further to the accused before Low continued his examination of him.

Mr. McClenaghan then urged that, according to evidence which McDonald had previously given (in the police court), after Low had asked what the accused's intentions were regarding the letters, he had answered, "Take them home," and Mr. Low asked "For what purpose?" and he shook his head, and that then McDonald's evidence was to the effect that "I said to the prisoner or informed him that he had been under suspicion for some time, and I said it would be better if you tell Mr. Low the truth about the whole thing and get this matter cleared up." When asked about the above matter, Duguay said that this remark of McDonald's to the

accused was made later on and not before Low questioned the accused. It would appear from a subsequent answer of Duguay that he was not sure as to the exact time at which McDonald's objectionable remark was made. However, this witness was quite positive about one important point, and that was that he had asked the accused about the Percival letter several times, and that the accused had taken the bunch of seven letters from his trousers' pocket and suggested that the letter in question might be among these, before Low or any other person came into the room where they were.

The witness Low confirmed Duguay's testimony as to the interview of the latter with the accused before the others entered the room, and stated that, when he, Low, entered, the seven letters were lying on the desk. He then remarked to the accused, "You find yourself in a somewhat difficult position, do you not?" to which the accused made no answer. Low then asked him what did he intend to do with the letters, to which the accused mumbled something unintelligible, and Low then asked him if he intended to take them home, to which the accused replied that he supposed so. At this point Low called McDonald, the detective, to come in, and the latter asked if the usual warning had been read to the accused. When told that it had not, McDonald read the warning to Brown and asked him if he understood it. Low then continued his inquiries, and states that he is quite clear that McDonald made no further remarks to the accused at that time, but did say something later on. Low asked the accused again what he intended doing with the letters, and the latter assented when he was asked if he intended to take them home. Low then said to him, "Brown, are these the first letters which you have taken?" and he said "Yes." "Then I said, 'Now, Brown, I know that isn't true because we have been watching you for some time; now, when did you take other letters?' His reply was, 'Only when I was hard up.'" It was after this, according to Low, that McDonald made his further remark to which objection is now taken.

It is to be noted that the objectionable statement on the part of McDonald was not mentioned in the evidence in chief of Low, but was brought out on his cross-examination by counsel for the accused, who mentioned to him the evidence which McDonald was stated to have given in the police court. Low apparently was quite sure that this remark by McDonald to the accused was not

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made until after Low had addressed to him his questions and obtained the answers above given.

McDonald, the detective, states, without giving particulars of them, that Low had asked his questions and received certain answers before he, McDonald, had said to the accused that it would be better for him to tell the truth and get the matter cleared up. When asked why he would make a remark like that to the accused, after the accused had answered questions which Low had already put to him, McDonald explained that his remark had reference to the taking of other letters which had been missing from the post-office and which the accused was suspected of having taken.

The admission or rejection of an alleged confession on the part of an accused person is, subject to certain well-defined principles, largely a matter of discretion on the part of the trial Judge, who is required to investigate carefully and fully the surrounding circumstances, and, having these in mind, to accept or reject the evidence (*vide Ibrahim v. The King*, [1914] A.C. 599, at p. 609 *et seq.*) Whether or not the alleged confession is admissible is a question to be determined upon the facts in the case, but it is well settled that in such a case the consideration of and decision upon the facts is for the Judge and not for the jury. The latter, however, once the evidence is admitted, must determine the weight which shall be given to it. The view of the trial Judge regarding the order in which the various questions and answers were put and made is shewn by his statement, on p. 31 of the evidence, upon the discussion by counsel for the accused of the question of admissibility. The trial Judge there states:—

“HIS HONOUR. . . . The evidence is that that happened after the accused had admitted to Mr. Low, in answer to his question as to what he intended doing with the letters, that he was going to take them home, and I do not see that it is of any importance in this case whether it is left in or kept out, what McDonald said after this admission by the accused.”

The accused himself was not asked anything as to the objectionable remark made to him by McDonald, or as to his reply thereto. He does, however, give his version of what took place in this interview with Duguay, commencing at p. 34 of the evidence. His testimony accords substantially with that given by Duguay, including the inquiry by the latter as to the missing Percival letter, his own denial of any knowledge regarding it, and his subsequently taking the bunch of seven letters out of his pocket and handing

them to Duguay. Then he states that Mr. Low came in and started asking questions; he does not know which was the first question asked, but states that there were several, one of them being, "You find yourself in a somewhat difficult position?" Then Low asked him, "What were you going to do with these letters you have produced?" and further whether he intended taking the letters home with him, and to this he replied that he supposed he did. He further states that Low asked him if he had ever taken letters before and that he denied having done so.

In the course of his charge to the jury the learned County Court Judge repeats what he had said in the course of the taking of the evidence, namely, that the conversation between Low and the accused took place after the warning had been read by McDonald, but before McDonald had any further conversation with the accused, and the learned Judge states that, if the evidence of Low is to be believed, all the admissions were made to Low before McDonald made the statement which was objected to.

Summarising the effect of the testimony of the witnesses, it would appear that the three for the prosecution stated at the trial that all the material answers of the accused with reference to the charge of taking the seven letters were given before and not after the making by McDonald of the remark to which exception was taken.

The above should, perhaps, be qualified by the statement that Duguay on cross-examination was not quite sure as to a question regarding the taking of other letters having been put and the answer received before McDonald made the remark in question.

The accused was not asked about the objectionable remark, but admits the giving of all the answers substantially as stated by Duguay and Low, except that regarding the taking of other letters previously as to which he states that he denied having taken them.

There was, therefore, no conflict of testimony at the trial regarding the admissions made by the accused, as to which all three witnesses were agreed that they had been made before the objectionable remark on the part of the detective. The only evidence on the record indicating that any admission was made after the objectionable remark, was that which was read into the record by counsel for the accused, as having been given in the police court by McDonald (see p. 20 at the foot and foot of p. 29 and top of p. 30). Even from that evidence, so read into the trial record, it would appear that the only question and answer put and given

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after the objectionable remark was as to the taking of other letters previously by the accused.

It is also worthy of note that the trial Judge, in whose discretion the decision as to the admission of the confession lay, found as a fact that the confession was made before the objectionable remark and not after. Under these circumstances, in my opinion, the objection to the admission of the evidence regarding the answers of the accused to questions put to him in reference to the taking of the seven letters in question under the charge laid, is not well-founded, and does not afford any substantial or sufficient ground for interfering with the conviction, which must be affirmed, and the appeal dismissed.

MAGEE, J.A. (dissenting):—The appellant, Joseph J. Brown, was charged in two counts—the first being for theft of seven letters and the second for secreting, delaying or detaining seven post-letters. He was convicted on the first, and appeals. He was night clerk in the post-office, and on his way in a street-car from the post-office to his home was intercepted by a post-office superintendent, a post-office inspector, and a police detective, and asked to accompany them to the superintendent's office. Left alone with the inspector, he was asked if he knew anything of a letter addressed to one Percival and he said he did not. Being asked twice if he was quite sure, he pulled a bunch of letters out of his trousers' pocket and laid them before the superintendent. There were seven, and among them was the one he was asked for. These are the seven letters referred to in the indictment. The superintendent was then called in, and he asked, "What were you going to do with the letters, Brown—take them home?" and Brown answered "I suppose so." Being asked if he had ever before taken any other letters, he said he had not. The detective was called in, and, being told on inquiry that Brown had not been warned, gave him the usual caution, and later on told Brown, in presence of his superior officers, that he had been under suspicion and it would be better for him to tell the truth to the superintendent and get the matter cleared up. A statement was then obtained from the accused, but it was conceded at the trial and before this Court that what was said by the accused after this inducement could not properly be admissible, and the statement was not offered in evidence. But it was said that, before this inducement, the superintendent had asked him when he had taken

other letters, and he had answered, "Only when I was hard up." The inspector mentions this as occurring after the inducement. The superintendent says it was before, and the detective says the same, but had at the preliminary examination said that it was after. If it was after the inducement it would be equally as inadmissible as the rest of his statement. The learned trial Judge had to decide whether it was before or after the inducement, and he considered it was said before the latter and he therefore admitted it in evidence although objected to.

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Now the evidence given by the accused himself is that on the evening in question he was at work sorting letters in the post-office, working in his shirt sleeves, and that shortly after 10 o'clock he put on his coat and overcoat and got into a street-car. He swears that shortly after getting in the car he happened to feel a bulge in his coat-pocket and putting in his hand found a few letters. Wondering how they came to be there, he says he figured that somebody at the post-office had put them in his pocket as a joke, as they had done before, and had forgotten to let him know before he left, so he put them in his pants' pocket. He says, "I didn't know whether to go on and meet my wife, who was at a dance in Bank-street or get out of the car and take the letters back that night, and I decided to take them home and take them back to the post-office in the morning." He denied having ever taken any letters or having admitted doing so and denied taking those letters. Manifestly his admission that he was taking the letters home and his ignorance of the Percival letter were not inconsistent with this defence. But the other alleged admission—of taking letters when he was hard up—would tend strongly to influence the jury against his allegations of innocence on this occasion—and it was presented to the jury for that purpose and against the objection made. The jury were not warned that, if it was made after the inducement by the detective, they should dismiss it from consideration. Instead of that, it was pressed upon them that the superintendent had sworn to it and it was a question of veracity between him and the accused as to whether he had said it at all.

The rule as to confessions and admissions is thus stated in 16 Corpus Juris, p. 926, sec. 2287: "Whether a confession offered in evidence was free and voluntary is a question relating to the admissibility of evidence, and as such is generally a question for the Court in the first instance, particularly where the circum-

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stances under which it was obtained are such as reasonably to indicate whether it was or was not voluntary. But it has been held that while it is the right of the Court to decide primarily on the admissibility of a confession it is for the jury to determine ultimately whether such confession was voluntary; and that if there is a conflict of evidence and the Court is not satisfied that the confession was voluntary, it should submit the confession to the jury, with instructions to disregard it, if upon all the evidence they believe that it was involuntary."

So far from this course being adopted, the statement admitted upon contradictory evidence was actually pressed upon the jury and must have prejudiced them in considering the prisoner's allegation of innocent possession of the letters. For this reason I think the appeal should be allowed and a new trial had.

*Appeal dismissed (MAGEE, J.A., dissenting.)*

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[APPELLATE DIVISION.]

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REX v. MARCUS AND RICHMOND.

March 9.

*Criminal Law—Indictment for Rape of Girl under 14—Judge's Charge—Verdict of Guilty of Offence of Having Carnal Knowledge of Girl—Criminal Code, sec. 301—Verdict not Open to Jury—New Trial—Suggested Amendment of Conviction by Making it one of Minor Offence—Refusal to Amend.*

Two men were indicted for ravishing a girl twelve and one-half years old. At the trial the Judge charged the jury that it was open to them upon the indictment for rape to bring in a verdict of guilty of the offence of carnally knowing a girl under the age of fourteen years (sec. 301 of the Criminal Code), and the jury brought in such a verdict, and the prisoners were sentenced to long terms of imprisonment:—

*Held*, that upon the indictment for rape it was not permissible to bring in a verdict of guilty of an offence under sec. 301; and the error could not be overcome by virtue of any of the curative provisions of the Code.

*Held*, also, that, as the evidence disclosed a crime of peculiar brutality and wickedness, the conviction should not be amended by making it one for indecent assault—if the prisoners were guilty they should be adequately punished and should not escape by conviction of a minor offence.

A new trial was therefore directed.

AN appeal by the prisoners from their conviction of a certain offence, upon trial before RANEY, J., and a jury, at the Toronto Assizes, upon an indictment for having ravished a girl under the age of fourteen years.

February 25. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

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*R. T. Harding*, K.C., and *M. S. Millstone*, for the appellants. The verdict of the jury is not justified in law. On a trial upon an indictment for rape, under sec. 298 of the Criminal Code, the learned trial Judge erred in telling the jury that the accused could be found guilty of carnal knowledge under sec. 301.\* Under a charge of rape consent is a defence, but it is no defence to a charge under sec. 301. The appellants have not been tried on the latter charge at all. They could not be tried on the two counts together, as the defences are entirely different.

*Edward Bayly*, K.C., for the Crown. Under sec. 1014 (2) of the Code this Court can confirm the conviction even where there has been a mistake in law. The Court is asked to apply that section because there has been no miscarriage of justice. What was done by the learned trial Judge was in ease of the prisoners. It cannot be contended that the verdict is legal, but it would be an unnecessary hardship on the complainant and her parents to go through another trial of this nature about which there can be no doubt as to the outcome.

*Harding*, K.C., in reply, suggested that the conviction be changed to one of indecent assault.

March 9. The judgment of the Court was (by direction of the Chief Justice) read by MIDDLETON, J.A.:—These two men were tried before Mr. Justice Raney and a jury at Toronto, on the 3rd, 4th, and 5th December, 1930, upon the charge of having ravished a girl twelve and one-half years old.

During the course of the hearing some question was raised as to the failure of the Crown to shew that that which took place was without the consent of this child. The learned trial Judge charged the jury that it was open to them upon the indictment for rape to bring in a verdict of guilty of the offence provided for by sec. 301 of the Criminal Code, of carnal knowledge of a girl under the age of fourteen years, an offence to which consent is no answer. The jury brought in the verdict of guilty under this section, and the Judge imposed upon Marcus the sentence

\* 301. Every one is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife, whether he believes her to be of or above that age or not.

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The appeal is upon the short ground that upon the indictment for rape it is not permissible to find the accused guilty of the offence under sec. 301. This offence is not in any way included in the other charge, and it is based upon different facts and considerations. We think the ground of appeal is well taken and that the error permitted by the trial Judge cannot be overcome by virtue of any of the curative provisions of the Code, and, greatly as we regret it, it is necessary that a new trial should be ordered.

Upon the argument before us it was suggested that it would be open to us to amend the conviction so as to make it a conviction for an indecent assault, as this is included in the charge for which the prisoners were tried. This course was assented to by counsel for the accused and not objected to by the Attorney-General, but after the argument the Crown counsel notified us that he withdrew any consent given at the hearing, as he did not deem any punishment that could be awarded for indecent assault adequate under the circumstances of the case.

We agree with this view. The evidence disclosed a crime of peculiar brutality and wickedness. If the accused are guilty of it they should be adequately punished. We decline to be party to any compromise by which these men could escape by conviction of a minor offence. On the hearing the accused did not give evidence. On a new trial they may possibly do so, and until the whole evidence is given it would be improper to comment further upon the facts.

The order will, therefore, go for a new trial, and it is probable that the Crown will see fit to lay a further charge based upon the provisions of sec. 301.

*New trial ordered.*

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## [APPELLATE DIVISION.]

KEARLEY v. WILEY.

1931

March 10.

*Negligence—Motor-vehicle upon Highway—Injury Caused to Plaintiff—Time-limit for Bringing Action—Highway Traffic Act, sec. 53 (1)—Amendment by 20 Geo. V. ch. 48, sec. 11—Whether Applicable to Action Begun before Amendment Became Effective—Promise of Defendant to Pay Damages—Whether Affording Cause of Action.*

The judgment of ROSE, C.J. (1931), 66 O.L.R. 490, was affirmed on appeal.

*Stevenson v. Parkdale Motors* (1924), 55 O.L.R. 68, 56 O.L.R. 180, applied.

The plaintiff in his statement of claim set up a promise said to have been made by the defendant after the accident to pay the plaintiff the damages which he suffered by reason of the defendant's negligence:—

*Held*, that the pleading did not disclose a cause of action.

AN appeal by the plaintiff from the judgment of ROSE, C.J. (1931), 66 O.L.R. 490.

March 9. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*I. Levinter*, for the appellant, contended that the amendment to the Highway Traffic Act by (1930) 20 Geo. V. ch. 48, sec. 11, concerns a matter of procedure and has the effect of reviving the plaintiff's cause of action. If the statute merely affects procedure, and does not take away vested rights, the appellant's rights must be determined in accordance with the law at the time of the trial. If retrospective, the amendment applies to rights accruing before its passing and to pending actions: *Upper Canada College v. Smith* (1920), 61 Can. S.C.R. 413; *Dulmage v. Thompson* (1930), 39 O.W.N. 254; *Stephenson v. Parkdale Motors* (1924), 55 O.L.R. 680, 56 O.L.R. 180; *Kimbray v. Draper* (1868), L.R. 3 Q.B. 160. In any event the appellant is entitled to have considered the allegation in the statement of claim of an independent promise to pay.

*F. J. Hughes*, K.C., for the defendant, respondent, was not called on.

March 10. The judgment of the Court was read by MULOCK, C.J.O.:—The action was brought under the Highway Traffic Act for damages because of injury caused to the plaintiff by a motor-vehicle.

The cause of action arose on the 21st November, 1928. The writ was issued on the 27th October, 1929.

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Section 53 (1) of the Highway Traffic Act, R.S.O. 1927, ch. 251, which was in force both when the cause of action arose and when the writ was issued, was as follows:—

“Subject to the provisions of subsections 2 and 3 no action shall be brought against a person for the recovery of damages occasioned by a motor-vehicle after the expiration of six months from the time when the damages were sustained.”

Thus the cause of action was barred when the writ was issued.

On the 30th June, 1930, the plaintiff filed his statement of claim, and on the 2nd September, 1930, the statement of defence was filed, and amongst other defences the defendant pleaded that the action was barred by sec. 53.

By ch. 48, sec. 11, of the Statutes of Ontario of 1930, subsec. 1 of sec. 53 was amended by striking out the word “six” and inserting in lieu thereof “twelve.”

On the 5th September, 1930, the plaintiff filed his joinder of issue, whereby he pleaded that the amendment to sec. 53 was retrospective and applied to this action. By consent, pursuant to Rule 122, the defendant set down for hearing the point of law thus raised by the pleadings, and the same was argued before Rose, C.J.H.C., who delivered judgment holding the action barred, the order declaring “that the action is barred by virtue of the limitation section of the Highway Traffic Act, being chapter 251 of the Revised Statutes of Ontario, 1927, section 53, and amendments thereto.” From this judgment the plaintiff appeals.

Mr. Levinter contended that the amendment of 1930 was retrospective, and had the effect of reviving the plaintiff's cause of action which had been barred by reason of the action not having been brought within the six months as required by sec. 53.

I agree with the reasons of my learned brother Rose for his judgment, and would add that, in my opinion, we are bound by *Stevenson v. Parkdale Motors* and *Wonders v. Parkdale Motors*, 55 O.L.R. 680, affirmed in appeal 56 O.L.R. 180. Those were actions under the Highway Traffic Act for damages because of injury to the plaintiffs. The causes of action arose on the 11th July, 1923, and the writs were issued on the 11th March, 1924, being eight months after the causes of action arose. Section 54 of the Highway Traffic Act, 1923, imposed a time-limit of six months from the time when the damage was sustained within which actions might be begun. That Act came into force on the 31st December, 1923, and it was contended that sec. 54 was

an enactment respecting procedure and was retrospective and therefore applied to those cases. Logie, J., the trial Judge, held that sec. 54 did not deal with procedure but with rights and therefore was not retrospective, and his judgment was affirmed in appeal.

In the present case the defendant had acquired a statutory defence. The effect of construing the Act of 1930 as retrospective would be to create a cause of action against him, to deprive him of his right to immunity from the plaintiff's claim. The reasons for the decision in those two cases apply to the present case.

Mr. Levinter further calls attention to para. 8 of the statement of claim, which is as follows:—

“After the said accident hereinbefore referred to, the defendant, by himself or by his agent, agreed to pay the plaintiff damages which he suffered by reason of the defendant's negligence, and when demand was made upon the defendant for payment, in accordance with the agreement or promise, the defendant wrongfully and illegally refused to pay the claim.”

Mr. Levinter pointed out that the learned trial Judge had not dealt with the alleged cause of action mentioned in this paragraph, but that the formal order went beyond the judgment of the learned trial Judge. We do not think that para. 8 discloses a cause of action.

*Appeal dismissed with costs.*

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[IN CHAMBERS.]

REX V. BALDASSARI ET AL.

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March 10.

*Criminal Law—Besetting Theatre—Criminal Code, sec. 501—Whether Besetting Done “Wrongfully and without Lawful Authority”—Trades Union—Peaceable Conduct of Besetters—Nuisance or Libel not Shewn—Magistrate's Conviction Quashed.*

The defendants were convicted under sec. 501 of the Criminal Code of besetting a theatre, wrongfully and without lawful authority, with a view to compel the manager of the theatre to enter into a contract to employ operators belonging to a trades union. The besetting was admitted and also the fact that the acts proved were done with the view stated. The acts proved were parading in front of the theatre wearing coats on which were printed, “This theatre is trying to destroy Union working conditions” and other similar legends. The conduct of the defendants was peaceable; there was no uproar or disturbance, no one accosted, no crowd gathered; and there was no evidence of any threats, obstruction, molestation, or incommoding of patrons or prospective patrons of the theatre:—

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*Held*, upon a case stated by the convicting magistrate, that proof merely that the defendants acted with the view stated in sec. 501 was not proof that they acted "wrongfully and without lawful authority."

Nor was it otherwise proved that they so acted: they were not guilty of disorderly conduct as defined in sec. 238 (f) of the Code; their acts did not amount to a common-law nuisance, nor was there any publication of a libel—the words printed on the coats were not *prima facie* libellous without proof that the Union conditions were conditions that ought to prevail, so that there was something disgraceful in attempting to destroy them.

*Robinson v. Adams* (1924), 56 O.L.R. 217, followed.

The convictions were quashed.

AN appeal by the defendants, upon a case stated by Mr. Burbridge, K.C., Police Magistrate for the City of Hamilton, from their convictions of offences against sec. 501 of the Criminal Code.

The appeal was heard by ROSE, C.J., in Chambers.

*H. A. F. Boyde*, for the defendants.

*W. F. Schwenger*, for the Crown.

March 10. ROSE, C.J.:—The defendants were convicted under sec. 501 of the Criminal Code upon an information charging that they did, unlawfully, wrongfully, and without lawful authority, with a view to compel the manager of the Lyric Theatre to enter into a contract to employ moving picture machine operators belonging to the International Alliance of Theatrical Stage Employees and Moving Picture Operators, beset or watch the said Lyric Theatre.

The besetting is admitted, as is also the fact that the acts proved were done with the view stated; so that the only question in the case is whether the accused acted "wrongfully and without lawful authority."

The besetting took this form: the defendants, two at a time, wearing rain-coats on the back of which were printed, "This theatre is trying to destroy Union working conditions," "Protect your own future by staying away from this theatre," "This theatre does not employ Union projectionists," and "Stay away from this theatre if you believe in Union working conditions," paraded in front of the theatre, walking separately, one going in one direction and the other in the opposite direction, the two meeting, usually, about opposite the middle of the front of the theatre. The conduct of the appellants was peaceable; there was no uproar

or disturbance; no one was seen to be accosted; no crowd gathered; there was no evidence of any threats, obstruction, molestation, impeding or incommoding of patrons or prospective patrons of the theatre.

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The grounds upon which the learned police magistrate convicted are stated by him as follows: "I was of the opinion that the object of the actions on the part of the appellants was in itself unlawful because their purpose was by duress to compel the complainant to enter into a contract, and that that factor made the whole action of the appellants unlawful. I was further of the opinion that, if the object of the appellants was not unlawful, the manner in which they proceeded to carry out the 'picketing,' that is, the acts complained of, constituted disorderly conduct on a public street." And the question stated for the determination of the court is: "Do the facts as stated constitute any evidence to warrant the holding that the appellants were guilty of the offence charged."

There is weighty authority in support of the first of the opinions expressed by the magistrate, viz., that the defendants' acts were done wrongfully and without lawful authority inasmuch as they were done with a view to compel the complainant to do something from which he had a lawful right to abstain; but, after long consideration of the relevant authorities—of which the principal are *J. Lyons & Sons v. Wilkins*, [1899] 1 Ch. 255; *Ward Locke & Co. Ltd. v. Operative Printers' Assistants' Society* (1906), 22 Times L.R. 337; *Rex v. Blachsawl* (1925), 21 Alta. L.R. 580, [1925] 4 D.L.R. 247; and *Reners v. The King*, [1926] S.C.R. 499—I am of opinion that proof merely that the defendants acted with the view stated in sec. 501 of the Criminal Code is not proof that they acted "wrongfully and without lawful authority," and that the conviction cannot be supported upon the first of the grounds stated by the magistrate. In considering the *Blachsawl* case it is to be noted that, as is stated by Mr. Justice Clarke in the *Reners* case, the attention of the Court was not directed to the *Ward Locke* case.

Then as to the second of the grounds upon which the magistrate proceeds. The defendants were not guilty of disorderly conduct as it is defined in sec. 238(f) of the Criminal Code; they did not cause a disturbance in the street, and they did not impede or incommode peaceable passengers; and so I do not think that

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the conviction can be upheld upon the second ground just as it is stated. And I do not think that the acts complained of amounted to a common-law nuisance, or that it ought to be said that there was any publication of a libel. The charges printed on the backs of the rain-coats, that the theatre was trying to destroy Union working conditions, and that it did not employ Union projectionists, are not, in my opinion, *primâ facie* libellous without proof that the Union conditions are conditions which ought to prevail, so that there is something disgraceful in attempting to destroy them. My opinion on this point does not seem to me to be at variance with the opinion as to other words to which I gave effect in *Meretsky v. Arntfeld* (1922), 21 O.W.N. 439; and, as was pointed out by Middleton, J.A., in *Robinson v. Adams* (1924), 56 O.L.R. 217, "it is not defamatory to state truthfully of a business man that he will not employ the members of a trades union in his business."

For the foregoing reasons, I am of opinion that the question asked must be answered in the negative and that the convictions must be quashed.

There will be the usual orders for protection.

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[ROSE. C.J.]

1931.

CITY OF TORONTO v. POWELL.

March 12.

*Assessment and Taxes—Income Tax—Imposition upon Deceased Person — Assessment Act, secs. 60, 98(3) — City By-laws — Action against Executrix for Amount of Tax—Dismissal.*

In the year 1928, the city corporation, as permitted by sec. 60 of the Assessment Act, R.S.O. 1927, ch. 238, caused the preparation of an assessment roll which was intended to be used under sec. 65(5) as the basis of taxation in 1929. P. made a return of income, disclosing, as the statute requires, the income received by him during 1927. That return was used by the assessor, the roll was completed, notice of assessment was given to P., and the time for appealing expired, but no appeal was taken. P. died in September, 1928, and in December, 1928, probate of his will was granted to the defendant, his executrix. On a later day in that month, the roll was finally passed by the Court of Revision and certified by the clerk pursuant to sec. 73 of the Act. By a by-law (No. 12016) passed by the city council in February, 1929, it was enacted that the assessment made in 1928 for 1929 "is hereby adopted as the assessment" for 1929, on which the rate of taxation for 1929 shall be fixed and levied, and that there shall be assessed, levied, and collected by taxation for 1929 certain sums set forth. By another by-law, passed on the same day, pro-

vision was made for the collection of the taxes imposed by by-law No. 12016. This action was brought by the city corporation against the executrix for the amount of the income tax purported to be imposed upon P. in 1929, after his decease:—

*Held*, that there was nothing in what was done to support any claim against the executrix—the attempt to tax P. after his death was a mere nullity; and no attempt was made to tax the executrix.

Section 98(3) of the Assessment Act considered.

*Sifton v. City of Toronto*, [1929] S.C.R. 484, and judgment of MASTEN, J.A., in *Re Kemp and City of Toronto* (1930), 65 O.L.R. 423, 439, followed.

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AN action brought by the Corporation of the City of Toronto against the executrix of the will of the late Charles B. Powell for the amount of a municipal income tax purported to be imposed by it upon him in the year 1929, after his death.

The action was tried before ROSE, C.J., without a jury, at a Toronto sittings.

*J. P. Kent*, for the plaintiff corporation.

*Samuel Rogers*, for the defendant.

March 12. ROSE, C.J.:—The relevant facts, all of which are admitted, are as follows:—In the year 1928 the city, availing itself of the permission contained in sec. 60 of the Assessment Act, R.S.O. 1927, ch. 238, caused the preparation of an assessment roll which was intended to be used under sec. 60(5) as the basis of taxation in the year 1929. Mr. Powell made a return of income, disclosing, as the statute required, the income received by him during the year 1927. That return was used by the assessor; the roll was completed; notice of assessment was given to Mr. Powell; and the time for appealing expired, but no appeal was taken—indeed there was nothing to appeal against, Mr. Powell, a resident of Toronto, being set down on the roll for the correct amount of income.

Mr. Powell died on the 29th September, 1928; and in December, 1928, probate of his will was granted to the defendant, the executrix named therein. At a later day in December, 1928, the assessment roll was finally passed by the Court of Revision and certified by the clerk pursuant to sec. 73 of the Assessment Act. On the 22nd February, 1929, the city corporation passed by-law No. 12016 whereby, after recitals to the effect that it was expedient and necessary to raise by a tax on the ratable property in the City of Toronto a sum of money for the public uses of the city for the current year and other purposes, and that the assessed value of

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all the ratable property in the city as the same appeared by the last revised assessment, "being that made in the year 1928 for the year 1929," was a certain stated sum, it was enacted (1) that "the assessment made in the year 1928 for the year 1929 is hereby adopted as the assessment for the City of Toronto for the year 1929, on which the rate of taxation for the year 1929 shall be fixed and levied," and (2) that "there shall be assessed, levied and collected by taxation in the City of Toronto for the year 1929 for the several purposes, and in the manner hereinafter mentioned and directed," certain sums set forth in the by-law.

By another by-law passed on the same day and numbered 12017, provision was made for the collection of the taxes imposed by by-law No. 12016.

The relevant statutes, it will be observed, are the Assessment Act and the Municipal Act as printed in the revised statutes. The amendment made in 1929 to sec. 10(2) of the Assessment Act, referred to in Mr. Justice Masten's judgment in *Re Kemp and City of Toronto* (1930), 65 O.L.R. 423, at p. 439, was not assented to until the 28th March, 1929; and, of course, the amendment of sec. 98(3) made by the Assessment Amendment Act, 1930 (20 Geo. V. ch. 46, sec. 3(7)), need not be discussed.

The power of the municipality to impose taxation is the power conferred by sec. 306 of the Municipal Act (sec. 297 of the Act of 1914, referred to by Smith, J., in *Sifton v. City of Toronto*, [1929] S.C.R. 484, at p. 487). That section requires the council in each year to assess and levy on the whole ratable property within the municipality a sum sufficient to pay all debts of the corporation falling due within the year. The duty thus imposed was the duty attempted to be performed by the council of the City of Toronto in passing by-law No. 12016. That by-law imposed upon the persons whose names appeared upon the assessment roll, and who could properly be assessed, a liability to pay taxes—a liability which theretofore had not existed. This is plain, I think, from the judgment in the *Sifton* case, and from the judgment of Mr. Justice Masten, concurred in by Chief Justice Latchford in *Re Kemp and City of Toronto*, 65 O.L.R. 423. But, unless there was "the conjunction of a living person residing in the municipality and the receipt of income by such person," there was no power to tax, as is stated by Mr. Justice Masten on p. 432. The city, in adopting the roll and in enacting generally that the roll prepared in 1928

should be the basis of the taxation in 1929, took, as was stated by Mr. Justice Magee in *Sifton v. City of Toronto* (1929), 63 O.L.R. 397, at p. 403, the risk that the taxation would not validly be imposed upon persons who, although their names were upon the roll, were not liable to be taxed.

Therefore, subject to what has to be said about sec. 98(3) of the Assessment Act, I think there is nothing in what was done—the preparation and the adoption of the roll and the passing of the taxing by-law—to support any claim against the executrix of Mr. Powell's will. The attempt to tax Mr. Powell after his death was, I think, a mere nullity: and no attempt was made to tax the executrix.

Section 98(3) of the Assessment Act (as printed in the Revised Statutes) is as follows: "Subject to the provisions of section 121 every person assessed in respect of business or income upon any assessment roll which has been revised by the court of revision or county judge shall be liable for any rates which may be levied upon such assessment roll notwithstanding the death or the removal from the municipality of the person assessed or that the assessment roll had not been adopted by the council of the municipality until the following year."

Exactly what that subsection means I do not know. It seems to say, but it cannot mean, that in certain circumstances a person shall be liable for rates notwithstanding his death. But perhaps one is not in the present case concerned so much with what it does mean as with what it does not mean; for, in the *Sifton* case, the Supreme Court decided that Mr. Sifton, who had left the municipality after the roll was revised in 1923, but before the taxing by-law was passed in 1924, was not by sec. 98(3) made liable for the rates of 1924—the section applying only to rates properly assessable, and no rates being properly assessable in 1924, in respect of income, against a person who had removed from the municipality in 1923. That is to say, the court decided that the subsection has not the effect of bringing all persons whose names are on the revised assessment roll under a continuing obligation to pay all such taxes as may, in the year following the revision, be imposed upon them in respect of their incomes as set down in the roll. But unless the subsection has the effect just suggested it cannot support the city's claim in the present action; for the city's contention must amount to this: that when the assessment roll had

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been revised in 1928 the subsection brought Mr. Powell under an obligation to pay such tax in respect of income as might, upon the footing of the roll, be imposed upon him in 1929; that upon Mr. Powell's death in 1928 the obligation became an obligation of his estate; and that upon the adoption of the roll and the imposition of the tax in 1929 the obligation of the estate became enforceable in an action brought against the executrix of Mr. Powell's will. But if the subsection did not apply so as to support a claim against Mr. Sifton, who had merely moved away from the municipality, it cannot by any stretch of the imagination be thought to apply so as to support a claim against the executrix of a person who has departed this life. I think that the argument as to the effect of sec. 98(3) is entirely met by the judgment in the *Sifton* case. Indeed I think that the case as a whole is covered by that judgment and the reasoning of Mr. Justice Masten in the *Kemp* case, and that it was unnecessary to say more. But the case was so admirably argued that I have thought it right to consider not only the cases that have been referred to but the other cases that were cited and to express my views somewhat at length.

The action fails and will be dismissed with costs.

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[APPELLATE DIVISION.]

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 March 18.

REX V. SMART AND YOUNG.

REX V. PATERSON AND CAMPBELL.

REX V. STOBIE AND FORLONG.

*Criminal Law—Conspiracy of Stockbrokers to Defraud Customers—Affecting Market Price of Shares—Contracting to Buy Shares and Making no Delivery—Criminal Code, secs. 231(1) (b), 444—Evidence—Books of Account and Records of Defendants—Admissibility—Judge's Charge—Sentences—Appeals from Convictions.*

The several defendants, stockbrokers, were indicted and tried for (1) conspiracy, by fraudulent means, to defraud customers, contrary to sec. 444 of the Criminal Code, (2) for conspiracy, by fraudulent means, to affect the public market price of stocks publicly sold, contrary to sec. 444, and (3) for that, with the intent to make gain or profit by the rise or fall in price of stocks, they did make agreements purporting to be for the sale or purchase of such stocks in respect of which no delivery was made or received and without the *bonâ fide* intention to make or receive such delivery, contrary to sec. 231(1) (b) of the Code. The defendants were all found guilty and sentenced to terms of imprisonment:—

*Held*, upon appeal from the convictions, that the books of account, records, and other documents of the defendants were properly admitted at the trial as evidence against them.

*Rex v. Horne Tooke* (1794), 25 How. St. Tr. 1, 121, and *Shrewsbury v. Blount* (1841), 2 M. & Gr. 475, followed.

*Held*, also, that the several charges to the jury were proper in the circumstances, and that the defendants received trial according to law and were rightly convicted.

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THE following statement is taken from the judgment of LATCHFORD, C.J.:—

These appeals are against convictions made at the Toronto Autumn Assizes of 1930, upon indictments based on alleged infractions, during 1928, 1929, and 1930, of certain sections of the Criminal Code. The appellants were sentenced to various terms of imprisonment. As against these sentences there are appeals by leave on the part of those convicted in the second and third cases.

The three indictments—*mutatis mutandis*—are identical in form. That against Smart and Young runs as follows:—

“In the Supreme Court of Ontario.

“Canada.

“Province of Ontario.

“County of York.

“To Wit:

“(1) The jurors for our Lord the King present that William John Smart and Maurice Elton Young did, in the years 1928, 1929, and 1930, unlawfully conspire with each other and with Wilbur H. Funk and with other persons whose names are to the jurors unknown, by deceit or falsehood or other fraudulent means, to defraud persons who were or might become clients or customers of Homer L. Gibson and Company, Homer L. Gibson & Company Limited, and Homer L. Gibson Company Limited, or any of them, contrary to section 444 of the Criminal Code.

“(2) The jurors for our Lord the King further present that William John Smart and Maurice Elton Young did, in the years 1928, 1929, and 1930, unlawfully conspire with each other and with Wilbur H. Funk and with other persons whose names are to the jurors unknown, by deceit or falsehood or other fraudulent means, to affect the public market price of stocks and shares publicly sold, contrary to section 444 of the Criminal Code.

“(3) The jurors for our Lord the King further present that William John Smart and Maurice Elton Young did, in the years 1928, 1929, and 1930, with the intent to make gain or profit by

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the rise or fall in price of stocks of incorporated companies, make or sign or authorise to be made or signed contracts or agreements oral or written purporting to be for the sale or purchase of such shares of stock in respect of which no delivery of the shares of stock sold or purchased was made or received and without the *bonâ fide* intention to make or receive such delivery, contrary to section 231(1) (b) of the Criminal Code."

Smart and Young were originally employees of one Homer L. Gibson, a broker. Later they were managers for him of a brokerage company incorporated under the name of Homer L. Gibson & Co. Ltd., and afterwards they became owners and managers of an incorporated company named Homer L. Gibson Co. Ltd., which continued the business theretofore carried on by Homer L. Gibson. Smart and Young were found guilty on the first and second counts. Funk, who was one of their employees, was found not guilty on all counts.

Smart was sentenced to imprisonment for three years on the first count and for two and a half years on the third count. Young's sentence was two and a half years on count 1 and two years on count 3, the sentences in both cases to run concurrently.

Paterson and Campbell, who were owners and managers of a corporation called D. S. Paterson & Co. Ltd., and, respectively, its president and vice-president, were found guilty under counts 1 and 2, the third count not being pressed by the Crown but traversed to the next sittings. Paterson was sentenced to three years' imprisonment on the first count and to two years' on the second. Campbell, not being considered as active in the management of the company as Paterson, received a sentence of two and a half years on the first count and two years on the second. As in the previous case the sentences were to be concurrent.

Stobie and Forlong carried on business not as a company but as a partnership. Like Paterson and Campbell, they were found guilty under counts 1 and 2. Stobie was sentenced to imprisonment for three years on the first count and two and a half years on the second. The sentence imposed on Forlong was two and a half years on count 1, and two years on count 2. Again, each lesser term was to run concurrently with the greater.

February 16, 17, 18, 19, 20, 23, 24, 26, 27, and March 2, 3, and 4. The appeals were heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

*I. F. Hellmuth*, K.C., and *R. H. Greer*, K.C., for the appellants Smart and Young, argued that the books of account, records, and other documents of Homer L. Gibson Co. Ltd. did not constitute evidence against the appellants, and should not have been admitted. The witness Dilworth, who gave most of this evidence, only testified that he found certain entries of sales. That did not prove the sales. It was only evidence against the company, not against the accused: Phipson on Evidence, 7th ed., pp. 212, 218; *Rex v. Harcourt* (1929), 64 O.L.R. 566. The indictment was bad in regard to count 3. Section 231 of the Code is a mere definition of a certain crime. The indictment is defective in that it does not specify the acts complained of. The accused should not be allowed to guess at this. There should be a count for every violation of the statute. Reference to Crankshaw's Criminal Code of Canada, 5th ed., pp. 476, 1043, 1101; *Regina v. Aspinall* (1876), 2 Q.B.D. 48, at p. 58; *Rex v. Goodfellow* (1906), 11 O.L.R. 359; *Rex v. Bainbridge* (1918), 42 O.L.R. 203, at p. 223; *Rex v. Thompson*, [1914] 2 K.B. 99; *Sylvestre v. The King* (1925), 45 Can. Crim. Cas. 241; Archbold's Criminal Pleading, Evidence, and Practice, 28th ed., p. 51; *Rex v. Leclerc* (1916), 26 Can. Crim. Cas. 242; *Rex v. Cohen* (1912), 26 O.L.R. 497; *Rex v. Sinclair* (1906), 12 Can. Crim. Cas. 20; *Rex v. Harcourt*, 64 O.L.R. 566. There was no evidence of non-delivery of stock ordered by a customer: *Forget v. Ostigny*, [1895] A.C. 318; *Thacker v. Hardy* (1878), 4 Q.B.D. 685; Tremear's Criminal Code, 4th ed., p. 271. Even if the evidence was admissible and the indictment was in proper form, the learned Judge's charge to the jury was objectionable for many reasons. He did not differentiate between the evidence relevant to count 1 and that relevant to count 3: *Rex v. Luberg* (1926), 19 Cr. App. R. 133, at p. 140. He did not place the theory of the defence fully and fairly before the jury; nor did he fairly discuss, in his charge, the question of reasonable doubt. There was no evidence that Young had made a solitary deal. The learned Judge should have pointed out that what might make Smart guilty on a substantive charge would not incriminate Young without such evidence against him. Young was not a party to a transaction in connection with the third count. The trial Judge should have told the jury about this lack of evidence. He should have pointed out that what may be evidence against both accused may not be evidence against either one on the specific charge. He should

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have told the jury that an essential ingredient of what goes to make a crime under sec. 231 is the intent to make gain or profit: *Rex v. Thompson* (1921), 16 Cr. App. R. 6; *Regina v. Dowd* (1899), 4 Can. Crim. Cas. 170. Nondirection and misdirection were such as to entitle the accused to a quashing of the conviction or at least to a new trial. As to count 1, this was bad, as it was merely a blanket charge, too vague, and not specific enough. Fraud is not a crime. Words must be used to define the fraud perpetrated on the public so as to give the accused notice of the offences with which they are charged. The indictment here was defective in that it did not specify the acts complained of: Tremear's Criminal Code, 4th ed., p. 429. The learned Judge stressed the evidence in favour of the Crown and slurred over that in favour of the accused. The theory of the defence should have been set out by the learned Judge as clearly as that of the Crown: *Brooks v. The King*, [1927] S.C.R. 633; *Rex v. Dinnick* (1909), 3 Cr. App. R. 77; *Rex v. Taylor* (1924), 18 Cr. App. R. 153; *Rex v. Marriott* (1924), 18 Cr. App. R. 74; *Regina v. Gibson* (1887), 18 Q.B.D. 537; *Rex v. Segal* (1925), 45 Can. Crim. Cas. 32.

W. N. Tilley, K.C., C. F. H. Carson, and A. W. Rogers, for the Crown, argued that the company's books were good evidence against the accused. They were evidence of acts resulting from the conspiracy. These documents were in the custody of the accused, and were used by them in their business, and were *prima facie* evidence against them of the system employed by them in their transactions with their customers: *Rex v. Horne Tooke* (1794), 25 How. St. Tr. 1, at pp. 120, 121. The indictments amply indicated the crimes charged, and the particulars and illustrations furnished by the Crown made these things even more clear. In any event, there was no substantial wrong or miscarriage of justice. The charge was fair and impartial and brought out every circumstance favourable to the accused. A summing up need not go through the evidence, especially where the case for the accused is ably presented by counsel, as here: *Rex v. McDougall* (1912), 7 Cr. App. R. 130; *Rex v. Blythe* (1909), 19 O.L.R. 386; *Brooks v. The King*, [1927] S.C.R. 633, 636.

*Hellmuth*, K.C., in reply. There was nondirection in a vital matter. There was no suggestion of guilty knowledge in the evidence, and this should have been told to the jury by the learned

Judge. There was confusion in the charge as to what the defence really was.

*D. L. McCarthy*, K.C., for the appellant Campbell, and *Peter White*, K.C., for the appellant Paterson, adopted the arguments of counsel for the appellants in the previous case, and relied upon the authorities cited by them. There was no evidence upon which the jury could reasonably find that the offences charged had been committed. No evidence was given that either of the accused had any knowledge of the entries in the books of the partnership or company, and so these books could not be evidence against them. The averment of the offences charged in counts 1 and 2 was defective in that it did not sufficiently define the conspiracy charged. The learned Judge's charge was also objectionable in many respects. Reference to *Regina v. Gibson*, 18 Q.B.D. 537; *Williamson v. Barbour* (1877), 9 Ch. D. 529; Phipson on Evidence, 7th ed., pp. 141, 142, 250, 362; *In re Printing Telegraph and Construction Co. of the Agence Havas, Ex p. Cammell*, [1894] 1 Ch. 528; *Dovey v. Cory*, [1901] A.C. 477, at p. 492; *Booth v. Helliwell*, [1914] 3 K.B. 252; *Re Rex v. Daly et al.* (1924), 55 O.L.R. 156; *Rex v. Gough* (1925), 57 O.L.R. 426; *Sweeney v. Coote*, [1907] A.C. 221; *Rex v. McCutcheon* (1916), 25 Can. Crim. Cas. 310; *Rex v. Bainbridge*, 42 O.L.R. 203; *In re Finlay*, [1913] 1 Ch. 565; *Rex v. Kerr et al.* (1922), 53 O.L.R. 228; *Clarke v. Baillie* (1911), 45 Can. S.C.R. 50.

*Tilley*, K.C., *Carson*, and *Rogers*, for the Crown, argued that there was abundance of evidence to support a conviction; that the indictment was properly framed, especially when the particulars and illustrations had been added; and that the learned Judge's charge was fair.

*R. S. Robertson*, K.C., for the appellant Stobie, and *H. H. Davis*, K.C., for the appellant Forlong, adopted the arguments of counsel for appellants in the two previous cases, and relied upon the authorities cited by them. A broker may have certain defined rights in a particular transaction by reason of his contract with his customer. The Crown had not shewn that the appellants had violated any contract with their customers. There was no proper evidence of a short position. Reference to *May and Hart v. Angeli* (1898), 14 Times L.R. 551; *Wilders v. Stevens* (1846), 15 M. & W. 208; *Forget v. Baxter*, [1900] A.C. 467; *Sweeney v.*

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*Coote*, [1907] A.C. 221; *Hill v. Manchester and Salford Waterworks Co.* (1833), 2 Nev. & M. 573; *Rex v. Lumgair* (1911), 3 O.W.N. 309.

*Tilley*, K.C., *Carson*, and *Rogers*, for the Crown, repeated their answers to the appellants' arguments in the two previous cases, and continued, contending that the appellants, being members of the firm, must have known that it was on the edge of a volcano. The books were presumed to continue as they were when taken over by an officer of the Court, and to contain records of partnership business, and so were evidence of a system adopted by the members of the firm. Both partners knew of the short position.

*Robertson*, K.C., and *Davis*, K.C., in reply, denied that the books disclosed a system.

MARCH 18. The judgment of the Court was read by LATCHFORD, C.J. (after setting out the facts as above):—The grounds of the appeals differ in minor respects but they are in substance virtually identical. The objection that the indictments as to counts 1 and 2 are too indefinite was disposed of by the Court during the argument at bar. What may be called the curative sections of the Code were considered fully to overcome the objections raised.

Count 3 may be open to objection on the ground that it is indefinite and multifarious; but, as in the only case in which it was pressed the sentences for its infraction were concurrent with those imposed for breach of sec. 444, it seems to us unnecessary to express any opinion regarding it.

It was strongly urged that the books of account, records, and other documents of the appellants did not constitute evidence against them. These documents were seized by the Crown on the business premises of the accused in January, 1930, when they were in use as formal records of the transactions of the businesses of the accused as they had been throughout 1928 and 1929 and, at the date of seizure carried on. In the contention of the Crown, they were used in execution of the conspiracy charged in each case in the first and second counts of the indictments. It is quite true that a trustee in bankruptcy or an accountant employed by the Crown had in one case disconnected some pages from a loose-leaf ledger, and had made entries in a book produced of transactions represented to have been made shortly before the seizure, but apparently not posted in the proper ledger. For such an entry,

whether rightly made or not, the particular appellants affected were not responsible; and the entries are, of course, not evidence against them. But the Crown did not rely on such entries or indeed on any particular entry in any of the books. What was relied on was that the books and papers, being in the custody of the accused, and made use of by them for their own purposes and in the conduct of their businesses, are *primâ facie* evidence as against the accused of the methods, systems and devices, of which they continuously availed themselves in their own speculations, and in their transactions with their customers and with other brokers.

"All papers found in the possession of a man are, *primâ facie*, evidence against him, if the contents of them have application to the subject under consideration:" *per* Lord Chief Justice Eyre in *Rex v. Horne Tooke*, 25 How. St. Tr. at p. 121.

In *Shrewsbury v. Blount* (1841), 2 M. & Gr. 475, the admissibility of evidence against defendants of certain books was considered by a strong Court. The books tendered in evidence contained an account of disbursements at a mine and of sales of ores there. They were in the handwriting of one Malachy, an agent of the defendants at the mine, and were rejected on the ground that there was nothing to connect them with the defendants. Had there been, it is clear that the books would have been admitted as evidence.

Tindal, C.J., said (p. 505): "To render them (the books) admissible, some evidence should have been given that the books were kept by Malachy in the course of his employment as an agent for the defendants."

Bosanquet, J., said (p. 506): "It was necessary, in order to make them (the books) evidence, to shew that they were kept by Malachy in his employment by the company."

Maule, J., said (pp. 506, 507): "As regards the rejection of the books—at the time they were tendered, nothing was shewn, except that they had been received from Malachy, and were in his handwriting. There was no proof that they were the books of the company; and, though such proof was subsequently given, they were not again tendered in evidence."

Here the books are undoubtedly books kept under the direction of the respective appellants; and, when their meaning and purpose were explained, as they were in each case, by competent testimony,

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App. Div. given in more than one instance by employees of the accused,  
 1931. and on the cross-examination of Smart and Young in the first  
 REX case, they constituted, in the opinion of the Court, evidence proper  
 v. to have been admitted by the learned Judge and submitted to the  
 SMART jury for their consideration.  
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After a most careful consideration of the evidence and all the objections raised and ably argued by counsel for the accused, the Court is of the unanimous opinion that the several charges to the jury were proper in the circumstances, and that the accused received trial according to law and were rightly convicted. We can find no grounds for interfering with the convictions and the sentences.

All the appeals are therefore dismissed.

*Orders accordingly.*

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[APPELLATE DIVISION.]

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POWER V. OUGH.

March 20.

*Joint Tenants—Judgment Recovered in County Court against one and Fi. Fa. Delivered to Sheriff—Death of Execution Debtor—Application to Revive Action and for Declaration that Joint Tenancy Severed—Motion Dismissed on Merits by County Court Judge—Want of Jurisdiction to Entertain Motion — Remedy by Interpleader—Rule 625.*

A mother and daughter were joint tenants of land. In an action in a County Court against the mother the plaintiff recovered judgment, and placed a writ of *fi. fa.* in the sheriff's hands in July, 1928. The mother died in December, 1928. The plaintiff asserted that upon the delivery of his *fi. fa.* to the sheriff the estate of the mother as a joint tenant was converted into an estate as tenant in common and was liable to be sold under his execution. The plaintiff moved in the County Court action for an order continuing it at his suit against the heirs-at-law of the mother and declaring that the lodging of the writ in the sheriff's hands had the effect of severing the joint tenancy. The County Court Judge entertained the motion, considered the question raised, and dismissed the motion:—

*Held*, on appeal, that the County Court Judge had no jurisdiction to entertain the motion, and his order was a nullity.

The dismissal of the motion was right and should be affirmed, with a declaration that the order was not a decision on the merits, leaving that to be determined in a proper proceeding, if necessary.

*Semble*, a proper method of bringing the question before the court is adequately provided by Rule 625, respecting interpleader.

AN appeal by the plaintiff from an order of TYTLER, Jun. Co. C.J., in an action in the County Court of the County of York,

dismissing the appellant's motion for an order that the action be continued and for a declaration that the delivery to the sheriff of the writ of *fi. fa.* issued upon the judgment in this action had the effect of severing a joint tenancy of certain lands.

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February 6. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and FISHER, JJ.A.

*J. R. Cartwright*, for the appellant, argued that the delivery of the writ of execution to the sheriff severed the joint tenancy in the lands in question, and so the writ attached to and bound the interest of the late Louisa Ough in these lands. The lodging of the writ causes a lien to arise against the interest of the joint tenants in the land, and so produces a severance by disturbing the unity of title: Bacon's Abridgment, vol. 4, p. 502; *Re Craig* (1928), 63 O.L.R. 192; *In re Woodall* (1904), 8 O.L.R. 288; 4 C.E.D. (Ont.) 893; *Woodland v. Fuller* (1840), 11 A. & E. 859, at p. 867; Halsbury's Laws of England, vol. 24, p. 204; *Re White* (1928), 23 O.W.N. 255, 8 C.B.R. 544.

*F. W. Torrance*, for Leonora K. Grace, respondent, contended that the writ did not cause a severance, and the joint tenancy came to an end only on the death of Louisa Ough, and so the respondent was entitled to the whole estate, despite the writ of *fi. fa.* Actual alienation only severs a joint tenancy: *Bradburn v. Hall* (1869), 16 Gr. 518; Foster on Joint Ownership, p. 43.

March 20. RIDDELL, J.A.:—This appeal was argued before us upon admitted facts and without reference to any possible irregularity. Supposing that all was regular, I wrote a considered judgment on the law in question; but my learned brother Masten, who examined the proceedings below, shews conclusively that no judgment can be given here on the merits.

In an action, judgment went for the plaintiff against (the now deceased) Louisa Ough, which judgment stands without attack; the rights to be determined in that action *transiverunt in rem adjudicatam*. The deceased defendant was a joint tenant with Leonora K. Ough, and died after a writ of *fi. fa.* was delivered to the sheriff. Leonóra K. Ough (now Leonora K. Grace), it is said, claims that the joint tenancy came to an end only on the death of the defendant and that she is entitled to the whole estate, notwithstanding the writ of *fi. fa.* The plain remedy was by way of an action for a declaration as to the rights of the

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plaintiff and Leonora; or, if there were a claim pressed by Leonora, an interpleader by the sheriff.

Instead of pursuing the proper course, the plaintiff applied to the Judge by way of motion to determine the question. It is clear that the Judge had no jurisdiction to make any such declaration in the action; and he should have dismissed the application on that ground. Instead of doing so, he gave written reasons for judgment, holding the joint tenancy not destroyed by the writ—this is wholly ineffective and *ipso facto* a nullity. The formal judgment, however, contains a simple dismissal of the motion with costs.

This formal judgment is right, and should be affirmed. But we should declare that this is in no way a decision on the merits, leaving that to be determined in a proper proceeding, if necessary.

As to costs, the whole proceeding resulting and necessarily resulting in a nullity and being one for which the plaintiff is wholly responsible, he should pay the costs in the court below. Before us, nothing was said on the point upon which alone we decide the appeal—for we have no more power than had the County Court to decide upon the merits—but, as the respondent is entitled to rely upon any ground to support the judgment, even though the reasons given below are not upheld, I think the appellant cannot escape the payment of the costs in this Court also.

MASTEN, J.A.:—The late Louisa Ough and her daughter Leonora K. Ough, now Leonora K. Grace, were “joint tenants and not tenants in common” of certain lands. In an action against the mother the appellant recovered judgment, and execution therefor was placed in the sheriff’s hands in July, 1928. Louisa Ough died in December, 1928. The appellant (the judgment creditor) asserts that upon the delivery of his *fi. fa.* to the sheriff in 1928 the estate of Louisa Ough as a joint tenant was converted into an estate as tenant in common and is now liable to be sold under his execution. This is denied by Leonora K. Grace, who claims that the joint tenancy continued until the death of her mother and that she (Leonora) is now solely entitled to the lands in question by survivorship.

To determine this question the appellant served a notice of motion of which the essential portions to be here noted read as follows:—

"In the County Court of the County of York.

"Between James Power, plaintiff,

"and

"Louisa Ough, defendant.

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"Take notice that the Court will be moved before the Judge Masten, J.A. of this Court presiding in Chambers at the court-house. . . .

"1. That this action may be continued at the suit of the plaintiff as party plaintiff thereto against Franklin Ough, Agnes Hill, and Leonora K. Grace, as parties defendant by order to proceed.

"2. For a declaration that the filing of the writ of execution issued in this action had the effect of severing the joint tenancy in the following lands:— . . .

"Dated at Toronto this 6th day of January, A.D. 1930.

"Smith, Rae & Greer,

"371 Bay-street, Toronto 2,

"Solicitors for the plaintiff.

"To Franklin Ough, Leonora K. Grace, and Agnes Hill."

Tytler, Junior County Court Judge, entertained the application, considered it on the merits, and dismissed it, holding that the delivery of the writ to the sheriff did not destroy the joint tenancy.

The appellant's motion was misconceived, and the court below had no jurisdiction to pronounce the judgment here in appeal, which must therefore be vacated.

The action abated by the death of Louisa Ough and has never been revived. Franklin Ough, Leonora K. Grace, and Agnes Hill are not parties to this action, and there is no authority in the Judicature Act or Rules of Practice under which the Court can entertain jurisdiction and make a declaration as against persons other than the parties to the action: *Brydges v. Brydges and Wood*, [1909] P. 187, at p. 191; *Ranson v. Platt*, [1911] 2 K.B. 291, at p. 307.

Nor can a plaintiff who has obtained judgment against the defendant enforce that judgment against the defendant's successor in title without a fresh action, and an order to add such successor cannot be made after final judgment has been drawn up and entered: *Attorney-General v. Birmingham Corporation* (1880), 15 Ch. D. 423; *Attorney-General v. Birmingham Tame and Rea Drainage Board* (1881), 17 Ch. D. 685.

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A proper method of bringing the question before the court is adequately provided by Rule 625, respecting interpleader, which reads as follows:—

“Relief by way of interpleader may be granted:

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(b) Where the applicant is a sheriff and claim is made to any money, goods, or chattels, *lands or tenements, taken or intended to be taken in execution* under a writ of execution, or to the proceeds or value thereof, by any person other than the person against whom the process issued.”

Without any determination of the merits, the judgment of the court below, in so far as it purported to determine the merits of the application, should be vacated, on the ground that the application was misconceived and that the court had no jurisdiction. The appeal should be dismissed with costs here and below, but the taxing officer in taxing the costs should take cognizance of the fact that the point on which the appeal is dismissed was not raised by counsel for the respondent in this Court or below.

LATCHFORD, C.J., and FISHER, J.A., agreed with MASTEN, J.A.

*Appeal dismissed.*

#### [APPELLATE DIVISION.]

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TAYLOR v. AINSLIE.

March 20. *Negligence — Motor-vehicle upon Highway — Injury to Pedestrian — Action for Damages—Highway Traffic Act—Onus upon Motorist Satisfied—Reversal of Finding of Trial Judge.*

In a city street, but 28 feet in width between kerbs, and at the time encroached upon by parallel lines of motor-cars closely parked on both sides, the defendant was carefully driving a large car northward in about the centre of the street, leaving a clear space of not more than 5 feet on each side of her car. Her speed had been reduced to less than 10 miles an hour, possibly to 8, because of an apprehension on her part, as she said, that some one might attempt to cross the street. The plaintiff walked from between two of the cars parked on the east side of the street, and, without looking to her left, compassed the few feet intervening between the line of cars on the east side and the course along which the defendant was slowly proceeding. The defendant saw her, realised the danger, promptly applied her brakes, which were in perfect order, and stopped her car, but too late to avoid striking the plaintiff, who was accordingly injured:—*Held*, reversing the finding of the trial Judge, based upon an inference from the undisputed facts, that the defendant had satisfied the onus cast upon her by the Highway Traffic Act to shew that she was not

negligent: there was nothing that she was called upon to do that she did not do; and the undoubted negligence of the plaintiff rendered the accident unavoidable.

The defendant was bound to anticipate what was reasonably likely to happen; but she had a right to expect that pedestrians would act reasonably; and she had no reason to anticipate that any one would be so foolish as to come out suddenly, without looking to see if there were any moving car too near, and go in front of her car, as the plaintiff did.

The sole and effective cause of the accident was the negligence of the plaintiff.

*Wilson v. Rebotoy* (1929), 64 O.L.R. 458, and other like cases, applied and followed.

AN appeal by the defendants from the judgment of JEFFREY, J., who tried the action without a jury, in favour of the plaintiffs for the recovery of \$405. The plaintiffs (husband and wife) claimed from the defendants damages for injuries sustained by the wife when knocked down by a motor-vehicle driven upon a highway by the defendant Agnes Ainslie, wife of the defendant G. D. Ainslie, the owner of the vehicle. The trial Judge found negligence on both sides, assessed the plaintiffs' damages at \$810, and apportioned the blame as equal, so as to make the amount of the plaintiffs' recovery \$405.

March 16 and 17. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*C. W. R. Bowlby*, for the appellants, argued that the appellant Agnes Ainslie was guilty of no negligence. She exercised all the care that any prudent driver should exercise. She was driving at a speed that was reasonable in the circumstances, and had a right to expect that the plaintiff Gladys Taylor would take due care: *Biehn v. Hands* (1922), 22 O.W.N. 35; *Seiden v. Pinkerton* (1926), 31 O.W.N. 325; *Wilson v. Rebotoy* (1929), 64 O.L.R. 458.

*F. W. Griffiths*, for the plaintiffs, respondents, contended that the judgment below was right. The appellant-driver should not have proceeded at more than two or three miles an hour, in the circumstances.

March 20. LATCHFORD, C.J.:—The facts in this case are not in dispute, but from them an inference has been drawn by the learned trial Judge which in the contention of the appellants it was not properly open to him to have drawn. The plaintiff Gladys Taylor's injuries were sustained midway in a block in St. Clair-avenue, in the city of Niagara Falls, and not at a street

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intersection or crossing. The avenue is but 28 feet in width between kerbs, and at the time was encroached upon by parallel lines of motor-cars closely parked on both its sides. The space available for vehicular traffic was thus reduced to 15 or 16 feet.

The defendant was carefully driving a large car northward in about the centre of the street, leaving a clear space of not more than 5 feet on either side of her car. Her speed had been reduced to less than 10 miles an hour, possibly to 8, because of an apprehension on her part that some one might intend to cross the street. What she did not apprehend—what she had, in my opinion, no reasonable ground to apprehend—was that any one should act as the plaintiff acted, and “rather quickly,” as a credited witness deposed, issue from between two of the automobiles parked on the east side of the street, and, without looking to her left, compass the few feet intervening between the line of such cars and the course along which the defendant Agnes Ainslie was slowly proceeding. The imminence of danger to which the plaintiff had so exposed herself was immediately realised by the defendant, who promptly applied her brakes, in perfect order, as the evidence discloses, and stopped her car, too late, however, to avoid injury to the plaintiff.

I think it is clear that the defendant satisfied the onus cast upon her by the statute to shew that she was not negligent. There was nothing that in the circumstances the defendant was called upon to do that she did not do. An inference to the contrary is, in my opinion, wholly unwarranted. On the other hand, the undoubted negligence of the plaintiff rendered the accident unavoidable.

Although the circumstances in no two automobile accidents are alike, decisions of this Court in recent cases, such as *Wilson v. Rebotoy*, 64 O.L.R. 458, render it clear that the appeal should be allowed with costs and the action dismissed with costs.

RIDDELL, J.A.:—In this appeal by the defendant from the judgment, at the hearing, of Mr. Justice Jeffrey, who tried the case without a jury, as what is to be considered negligence under particular circumstances must generally be largely a matter of individual judgment, I was somewhat strongly of the opinion that the most that could be made against the findings of the learned trial Judge was a doubt as to the correctness of his judg-

ment; and that, as to doubt was to affirm, the appeal failed. But a careful examination of the evidence leads me to the conclusion that the judgment ought not to stand. The facts of the case are simple: there was a wedding going on in a church on the west side of St. Clair-avenue, a street running north and south in the city of Niagara Falls, and the guests had strung their automobiles along both sides of the avenue during the ceremony. The defendant was driving her car at the rate of about 20 miles an hour, going north on the avenue, at some distance south of the church; when she came to the cross-street south of the church, she noticed the cars strung along the sides of the avenue and slowed down to about 8 or 10 miles an hour, recognising that she must "drive carefully . . . in case people would intend to cross" (to use her own words). When going north at this speed, she noticed two women step from between two cars closely parked on the east side of the avenue and "step right in the path of" her car. She immediately applied the brakes, which admittedly were in perfect order, but was unable, even at the reduced rate at which she was going, to stop in time to avoid running down one of the women, the plaintiff, injuring her somewhat seriously. The plaintiff does not remember whether she looked or not; but all the evidence indicates that she did not look before going out into the path of the defendant's car.

The learned Judge has found both guilty of negligence occasioning the accident and in equal proportions.

We have more than once laid down the standard of care to be taken by drivers of automobiles—they are bound to anticipate what is reasonably likely to happen; and have a right to expect that persons in the street will act reasonably; they are not to be mind-readers or necessarily to guard against anything as to which there is no likelihood that it will or may happen. In the present case, unless we are prepared to hold that going at the reduced rate of 8 to 10 miles per hour was, under the circumstances, negligence *per se*—and such a finding would savour of absurdity—I cannot see that we can hold the defendant negligent at all. She had reason to expect, indeed, that persons might be desiring to cross the street and that they would or might come in front of her car, but she had no reason to anticipate that any one would be so foolish as to come out suddenly without looking to see if there were any car too near, and go in front of her car, as the

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App. Div. plaintiff did. I am unable to find, in the circumstances of this  
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As to the statutory onus cast upon her, I think that she has met it; I would allow the appeal and dismiss the action with costs, here and below.

Even should we hold that the defendant was negligent, I think her negligence could not be considered as anything near equality with that of the plaintiff, and the judgment would require serious modification; but it is unnecessary to pursue this phase.

FISHER, J.A.:—The defendant appeals from the judgment of Jeffrey, J., at a trial without a jury of an action for personal injuries caused by an automobile driven by the defendant. The learned Judge was of the opinion that there was negligence on both sides, and in his reasons said: "In the circumstances of this case, I find that the female defendant was driving at too high a rate of speed, having regard to her own admission that she rather anticipated that what did happen might happen. I cannot say that her negligence contributed more to the accident than did the negligence of the plaintiff. I think they were both negligent, although, if anything, it may be that the negligence of the plaintiff contributed more to the accident than that of the defendant. But, on giving the matter thorough consideration, having some doubt in regard to it and not being able definitely to ascertain the degree of negligence between the parties, I think that justice will probably be done in the premises if I apportion the negligence equally between them." On these findings the plaintiff was awarded \$405 damages, with County Court costs, without a set-off.

The substantial facts which are not in dispute are that in the afternoon of the 7th June, 1930, the defendant Agnes Ainslie, the driver of the car, was proceeding on the east side of St. Clair-avenue in the city of Niagara Falls, and, observing many cars closely parked on either side of the street for a considerable distance and a crowd of people in front of the Presbyterian Church on the west side of the street, reduced her speed as she came into the parked car area down to 8 to 10 miles per hour, giving as a

reason that some person might enter the street from between the parked cars.

When the defendant arrived at about the centre of the block and almost opposite the church, the plaintiff, without looking to her left, stepped out from between two parked cars into the path of the defendant's car, and at the time the plaintiff stepped into the path of the defendant's car the defendant's car was about one length of the car from her, and the defendant, being unable to stop in time, knocked the plaintiff down and she was injured. It is not in dispute that the defendant stopped her car almost immediately after the impact.

From this narrative it is plain that the plaintiff was guilty of negligence, and the question to be considered is whether there was any negligence on the part of the defendant. In my view, it would be difficult to find a case where the driver of an automobile exercised greater care and caution than the defendant did in this case. There is no evidence that there were any persons crossing and re-crossing in the travelled portion of the highway, and all that the defendant had before her, as stated, were the parked cars and the probability of some one suddenly stepping out from between them. Beyond question, had the plaintiff, when she emerged from between the two cars, looked to her left—as she was bound to—she would have seen the defendant's car within about the length of the car, and, if she had stopped, no accident would have occurred.

It has been decided over and over again that if a person darts unexpectedly in front of an approaching motor-car so that the driver has no chance to avoid him, and an accident follows, it is his own negligence and he cannot recover. See *Seiden v. Pinkerton*, 31 O.W.N. 325. *Biehn v. Hands*, 22 O.W.N. 35, was a case where a plaintiff stepped from the kerb in front of a moving car, and Riddell, J., dismissed the action, saying that the real cause of the damage was the plaintiff's own negligence.

In *Robinson v. Toronto Transportation Commission* (1924), 27 O.W.N. 101, the plaintiff stepped from behind a standing car in front of one going in the opposite direction, and it was there held that, as no man in the position of the motorman could have seen the plaintiff until the moment she stepped out, until that moment arrived there was no duty on the part of the motorman

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to avoid injuring the plaintiff, and also until that moment there was no duty on the part of the motorman to avoid injuring the plaintiff.

Masten, J., in *Foster v. Zavitz* (1923), 24 O.W.N. 127, at p. 128, said: "The law does not require a supernatural poise or self-control . . . and if some unforeseen emergency occurs which would naturally overpower the judgment of an ordinarily careful driver, so that he fails to adopt the best course possible, he may not be negligent."

Also see *Wilson v. Rebotoy*, 64 O.L.R. 458.

All that the law requires is, where a situation of danger arises, that the person in charge of an automobile is called upon to (1) realise the danger; (2) determine upon the course of action; and (3) to act; and all of these the defendant in this case observed.

It is quite conceivable that, in a street where a driver of an automobile observes crowds of people crossing and re-crossing, for him to continue at 10 to 8 miles an hour would be dangerous, and in such circumstances his bounden duty would be to stop or so to reduce his speed that he could stop almost instantly. But that is not this case, as there is no evidence whatever of any one crossing the street from one side to the other or standing in the travelled portion thereof. If the defendant was not entitled to proceed beyond two or three miles per hour—which rate would be just creeping along—as contended by the learned counsel for the plaintiff, serious congestion and a holding up of traffic would result in the busy streets of our cities and large towns, as it is an every-day occurrence to see cars parked for blocks and sections of blocks on both sides of busy streets.

There must be a finding that the plaintiff stepped, without looking, from a place of safety to a place of danger, without giving the defendant an opportunity to avoid hitting her and that the defendant did everything in her power to stop her car and avoid an accident.

Even if it could be held that the defendant was guilty of some negligence, I am, with respect, unable to agree with the learned trial Judge in his apportionment of the degree of negligence on a fifty-fifty basis. In view of the plaintiff's admission that she did not look and had suddenly thrust herself in the path of the defendant's car, as contrasted with the conduct of the defendant,

who was proceeding with caution, I think a fairer and more equitable apportionment of negligence is that the plaintiff was guilty of 90 per cent. and the defendant of 10 per cent.

My conclusion is that the sole and effective cause of the accident was the gross negligence of the plaintiff, and I would allow the appeal and dismiss the action with costs.

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MASTEN and ORDE, J.J.A., agreed with LATCHFORD, C.J.

*Appeal allowed.*

[LOGIE, J.]

FLETCHER v. THOMAS.

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March 20.

*Negligence—Motor-vehicles upon Highway—Collision—Claim and Counterclaim—Findings of Jury—Both Parties Negligent—Apportionment of Blame—Loan of Vehicle—Bailment—Action Transferred from County Court to Supreme Court—Scale of Costs—Mistake by Jury as to Apportionment—Impossibility of Correcting after Discharge—Contributory Negligence Act, R.S.O. 1927, ch. 103.*

The defendant T. T., who lived in Michigan, lent his motor-car to the defendant C. T. for a trip to Canada. Upon a highway in Ontario the plaintiff's motor-car, driven by the plaintiff himself, collided, at a curve, with the car driven by C. T. The plaintiff brought this action for damages for the injury sustained in the collision, and the defendants counterclaimed for damages arising from the collision—the plaintiff and defendants each alleging negligence. The jury (in answer to questions) found: (3) that the accident was due to the common fault and negligence of both drivers; (4) that C. T.'s negligence consisted in "excessive speed on the curve" and encroachment of the car driven by C. T. on the south side of the highway; (5) that the plaintiff's negligence consisted in "excessive speed on the curve." The jury assessed the plaintiff's damages at \$700, the defendant C. T.'s at \$250, and the defendant T. T.'s at \$400; and found (9 and 10) that it was possible to determine the respective degrees of negligence, and that C. T.'s was 25 per cent. and the plaintiff's 75 per cent.:—

*Held*, that in a proper case the bailee is liable to the bailor for injury to the chattel bailed arising from the negligence of the bailee; and either the bailor or the bailee may sue a wrongdoer for damages; but, if an injury is done by the wrongful act of one to the property of another, the wrongdoer is liable to the owner quite apart from the existence of any contract of bailment.

The Contributory Negligence Act, R.S.O. 1927, ch. 103, does not affect the rights of a bailor who is not guilty of any negligence—as against the defendant T. T. the plaintiff is found to be solely negligent, and T. T. is entitled to recover the whole amount of his damages.

After the jury had been discharged, some of them stated that they had misunderstood questions 9 and 10 and really intended that the figures in the answer to question 10 should be reversed:—

1931. *Held*, that the jury could not be permitted to re-assemble and alter or purport to explain the verdict given—that would be a scandal on the administration of justice.

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THOMAS. *Knowlton v. Hydro-Electric Power Commission of Ontario* (1925), 58 O.L.R. 80, followed.

Nor, considering the answers to questions 4 and 5 with the answers to questions 9 and 10, should judgment be entered reversing the jury's findings, the charge having been clear and the finding as to the degrees of negligence confirmed by the jury in answer to a question of the Judge.

The plaintiff brought this action in a County Court; it was subsequently removed into the Supreme Court of Ontario, upon the application of the defendants, who counterclaimed for damages of \$500 for T. T. and \$1,000 for C. T., thus in effect bringing two new actions against the plaintiff for these amounts:—

*Held*, that the plaintiff was in the position of a defendant brought into the Supreme Court by the counterclaiming defendants, and should get from the defendants his costs on the County Court scale up to the time of the removal and on the Supreme Court scale thereafter; while, the amounts recovered by the defendants being within the jurisdiction of a County Court, they should recover one set of costs of counterclaim on the County Court scale.

AN action brought by Walter R. Fletcher against Ted Thomas and Charles J. Thomas to recover damages for injury sustained by the plaintiff by reason of a collision upon a highway between a motor-car driven by the defendant Charles J. Thomas and owned by the defendant Ted Thomas and a car owned and driven by the plaintiff; and a counterclaim by the defendants against the plaintiff for damages arising from the same collision; the plaintiff and defendants each alleging negligence on the part of the other.

March 11. The action and counterclaim were tried before LOGIE, J., and a jury, at the Toronto assizes.

*E. A. Richardson*, for the plaintiff.

*L. J. Brody*, for the defendants.

March 20. LOGIE, J.:—The defendant Ted Thomas, who resided in Detroit, lent his car to his brother, the defendant Charles J. Thomas, for a trip to Canada. On the 6th May, 1930, the plaintiff's car, driven by the plaintiff personally, collided with the defendant Ted Thomas's car, driven by Charles J. Thomas, at a curve on the Lake Shore-road between Toronto and Hamilton, about a mile west of Bronté. At the trial the jury answered the questions put to them as follows:—

1. Was the accident due solely to the fault and negligence of the defendant? A. No.

2. Or solely to the fault and negligence of the plaintiff? Logie, J.

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3. Or was the accident due to the common fault and negligence of both defendant and plaintiff? A. Yes.

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4. If you find the defendant Charles Thomas guilty of any negligence which caused the accident, wherein did such negligence on his part consist? Answer fully. A. (a) Excessive speed on the curve. (b) According to evidence submitted we are agreed that Thomas's car was encroaching on the south side of the highway.

5. If you find the plaintiff guilty of any negligence which caused or contributed to the accident, wherein did such negligence on his part consist? Answer fully. A. Excessive speed on the curve.

6. What is the entire amount of damage to which the plaintiff would have been entitled had there been no contributory fault or negligence on his part? A. \$700.

7. What is the entire amount of damage to which the defendant Charles Thomas would have been entitled had there been no fault or negligence on his part? A. \$250.

8. What is the entire amount of damage to which the defendant Ted Thomas would have been entitled had there been no fault or negligence on the part of Charles Thomas? A. \$400.

9. Is it possible or practicable on the evidence to determine the respective degrees of fault and negligence on the part of the plaintiff and the defendant Charles Thomas? A. Yes.

10. If so, what are the degrees in percentage? A. Charles Thomas 25 per cent.; plaintiff 75 per cent.

Three questions arise on these answers:—

First, do Ted Thomas's damages abate 25 per cent. owing to the negligence of Charles J. Thomas, by virtue of the Contributory Negligence Act, R.S.O. 1927, ch. 103?

Second, the jury which tried this case had been discharged after their verdict, but still remained in the court-room in pursuance of their duties. Certain of them approached counsel for the plaintiff and stated that they had misunderstood questions 9 and 10, and really intended that the figures set forth in the answer to question 10 should be reversed, and counsel asked that they be recalled in order that they might put the alleged error

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right, or in the alternative that, upon reading questions 4 and 5 in connection with questions 9 and 10, judgment should be entered for the plaintiff for 75 per cent. of his damages, and the defendants for 25 per cent. of their damages.

Third, the action having been commenced originally in the County Court of the County of York, and upon the application of the defendants having been removed to the Supreme Court of Ontario, upon what scale should the costs of plaintiff and defendants respectively be taxed?

The first question is not without difficulty, but I think the difficulty was created by a failure by counsel to consider the real meaning of contributory negligence and a failure to grasp the fact that each of the defendants, by counterclaiming, in reality began an action against the plaintiff.

It is necessary to consider the precise nature of the remedy given to a bailor against a bailee, and the remedy given to the bailor for injury done to the property of the bailor by a wrongdoer. There is no doubt that in a proper case the bailee is liable to the bailor for injury to the chattel bailed arising from the negligence of the bailee; and further, according to the dictum of Parke, B., in *Nicolls v. Bastard* (1835), 2 C.M. & R. 659, either the bailor or bailee may sue a wrongdoer for damages; and the same Judge in *Manders v. Williams* (1849), 4 Ex. 339, at pp. 344, 345, said: "No proposition can be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer; the latter by virtue of his possession, the former by reason of his property." But, if an injury is done to a chattel by the wrongful act of one to the property of another, the wrongdoer is liable to the owner quite apart from the existence of any contract of bailment.

In Beven on Negligence, 4th ed., p. 913, the learned author says:—

"The point is put by Bramwell, L.J., with his accustomed vigour in *Hayn v. Culliford* (1879), 4 C.P.D. 182, 185: "Where is the duty of care? I answer, that duty that exists in all men not to injure the property of others."

The plaintiff has been found guilty of negligence. Where then is the contributory negligence of the defendant Ted Thomas? Contributory negligence is defined as such an act or omission on the part of the plaintiff (in this case by counterclaim) amounting

to a want of ordinary care as, concurring or co-operating with the negligent act of the defendant (the plaintiff in the original action), is a proximate cause or occasion of the injury complained of.

Now if, for example, Ted Thomas knew that Charles J. Thomas was an incompetent driver, and this was charged in the pleadings and brought home to Ted Thomas, a jury might be justified in finding that that negligence of Ted Thomas was within the definition of contributory negligence above set out, and so reduce his damages. Nothing of this however is charged or proved. Does the Act then extend to deprive a bailor of his damages where there is no negligence on his part?

Prior to the Act, contributory negligence was, if proved, a complete defence to the action, but by this statute the Legislature has introduced the doctrine of comparative negligence, or, as it is known in Quebec, common fault. The old law in Ontario refused either to apportion the damages as best it could, giving to each man according to his deserts, as far as they can be ascertained, or, except in Admiralty, to divide the damages equally. It would not measure how much of the damage was attributable to the plaintiff's own negligence or fault. By the new Act all this is changed, and Judges and juries are to determine the respective negligences of the parties and strike a balance between them, so that a preponderance of negligence on the part of the defendant will warrant a recovery, but the plaintiff's damages are diminished in proportion to his own negligence, so that he shall have judgment for so much thereof as is proportionate to the degree of fault imputable to the defendant, and if it is not practicable to determine the degrees of fault the Judge or jury must estimate the plaintiff's damages, and the defendant is liable for one-half. These remarks are predicated on a finding of contributory negligence on the part of the plaintiff. If there is none on his part, then he is entitled to such damages as will compensate him reasonably for his injury or loss.

Anglin, C.J.C., in *McLaughlin v. Long*, [1927] S.C.R. 303, at p. 311, said, with reference to the Contributory Negligence Act, that "damage or loss is 'caused' by the fault of two or more persons only when the fault of each of such persons is a proximate or efficient cause of such damage or loss, i.e., only when at com-

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mon law each would properly have been guilty of negligence which contributed to causing the injurious occurrence."

The Contributory Negligence Act with regard to the reduction of damages has been considered in a number of Ontario cases: *Farber v. Toronto Transportation Commission* (1925), 56 O.L.R. 537; *Knowlton v. Hydro-Electric Power Commission of Ontario* (1925), 58 O.L.R. 80; *Engel v. Toronto Transportation Commission* (1926), 59 O.L.R. 514; *Ballantine v. International Railway Co.* (1927), 61 O.L.R. 273; *McLaughlin v. Long*, [1927] S.C.R. 303; *Stark v. Batchelor* (1928), 63 O.L.R. 135; *Dority v. Ottawa Roman Catholic Separate Schools Trustees* (1930), 65 O.L.R. 360. These do not touch the case of a bailor and bailee.

In my opinion, the Act does not affect the rights of a bailor who is not guilty of any negligence. As against him the plaintiff is found to be solely negligent and he is entitled to recover the whole amount of his damage. His bailee Charles J. Thomas was not his *alter ego*.

The second question has already been covered by the *Knowlton* case. In that case the learned trial Judge said (pp. 90 and 91): "It seems to me that it would be quite impossible, after the lapse of thirteen days or indeed any considerable time from the giving of their verdict and their being discharged, that a jury should be allowed to come back and say that they had not understood the questions or that their answers were to be changed. The grave danger of a miscarriage of justice from tampering with jurors or influence being brought to bear upon them would seem to me to make it quite out of the question that anything of this kind should be permitted."

I would go further than this and say that to allow a jury *functus officio* to re-assemble and alter or purport to explain a verdict already given by them would be a scandal on the administration of justice and cannot be permitted at any time after they have given their verdict and been discharged. If a higher court should see fit to order a new trial, that is quite a different matter, and I conceive that such a course would be taken only on the clearest proof of a grave miscarriage of justice.

Nor can I, as requested by counsel for the plaintiff, accede to his contention that, when the answers to questions 4 and 5 are

considered with the answers to questions 9 and 10, judgment should be entered reversing the jury's findings. The questions are clear. I charged the jury fully on the meaning and effect of the Contributory Negligence Act and asked them if they understood my charge. They answered in the affirmative. Again, after the verdict was rendered, and before the jury were discharged, I asked them if they intended to find the plaintiff guilty of 75 per cent. of the negligence and the defendant 25 per cent., to which question the foreman answered "Yes." It may be that he and they misunderstood the question and intended to give the plaintiff 75 per cent. of his claim and the defendant Charles J. Thomas only 25 per cent.; but this is not what they did after a clear charge and a subsequent question.

Then as to the question of costs. The plaintiff brought his action in the County Court of the County of York. It was subsequently removed to the Supreme Court of Ontario upon the application of the defendants, who claimed damages of \$500 for the defendant Ted Thomas and \$1,000 for the defendant Charles J. Thomas, thus in effect bringing two new actions against the plaintiff for these amounts. In *Foster v. Viegel* (1889), 13 P.R. 133 (approved in *Stark v. Batchelor*, 63 O.L.R. 135, at p. 138), Osler, J.A., said: "So far as the scale is concerned, I think the costs where the defendant recovers on a counterclaim are always those of the Court in which the plaintiff has brought the action, unless the Judge who tries the case for *good cause* makes a different order; and the fact that the recovery is for a sum within the jurisdiction of an inferior court is not a good cause for making an order."

In the case at bar the plaintiff is in the position of a defendant brought into the Supreme Court by the counterclaiming defendants, and should, I think, get his costs on the County Court scale up to the time the case was transferred to the Supreme Court, and on the Supreme Court scale after the transfer of the case from the County Court. The amounts recovered by the counterclaiming defendants are respectively within the jurisdiction of the County Court and they should recover one set of costs of counterclaim on that scale.

I have not omitted to consider the contention of the defendants' counsel that, had the plaintiff in the first instance claimed

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only the sum of \$700, his damages being purely a matter of calculation, there being no claim for personal injuries, instead of the sum of \$1,000, the defendants would not in any event have sought to have the action removed to the Supreme Court, nor would the learned Judge who heard the application to remove the action to the Supreme Court have, in the exercise of his discretion, granted the application; and that, the removal of the action having been alleged to have been occasioned in the first instance by the failure of the plaintiff to state properly the actual amount of his damages, the defendants should not be penalised for the plaintiff's default. The argument is ingenious but should not have any weight, because the action as originally laid was within the competence of the County Court if the defendants did not object thereto, and, secondly, considering the claim and counterclaim as two actions, while the defendant Ted Thomas's claim was beyond the jurisdiction of the County Court, he could have recovered it in that court, but the plaintiff was content and the defendants were not content to leave the action as laid in the County Court.

The defendant Ted Thomas is of course liable to the plaintiff as owner under the Highway Traffic Act.

In the result therefore the plaintiff recovers \$175 with costs on the County Court scale up to the time of transfer, and on the Supreme Court scale thereafter. The defendant Charles J. Thomas recovers \$187, and the defendant Ted Thomas recovers \$400, with one set of costs on the County Court scale.

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*Criminal Law—Combine—Combines Investigation Act, R.S.C. 1927, ch. 26 — Criminal Code, sec. 498 — Unlawful Combination — Trade Union — Conspiracy — Indictment Containing Seven Counts — Trial of Six Defendants before Judge without Jury — Trade Unions Act, R.S.C. 1927, ch. 202—Evidence—Findings of Trial Judge—Participation or Complicity in Unlawful Acts—Operation of Organisations—Conviction of three Defendants—Punishment.*

The six defendants were tried upon an indictment containing seven counts for being parties or privies to or knowingly assisting in the formation or operation of a combine as defined by various clauses of sec. 2 of the Combines Investigation Act, R.S.C. 1927, ch. 26, and for unlawfully conspiring unduly to prevent or lessen competition in the purchase, barter, sale or supply of articles which may be the subject of trade or commerce, and to restrain or injure trade and

commerce in relation to such articles, and unduly to limit the facilities for supplying or dealing in such articles, to wit, plumbers supplies, contrary to various clauses of sec. 498 of the Criminal Code. The defendants exercised the option given them by sec. 39 of the Combines Investigation Act and sec. 581 of the Criminal Code, and elected to be tried and were tried before a Judge of the Supreme Court of Ontario, sitting without a jury.

The defendants having pleaded "not guilty," a motion for leave to move to quash the indictment, under sec. 898 of the Code, was refused, in view of secs. 854, 855, and 891 of the Code.

*Held*, upon the evidence, that there was a combine within the provisions of the Act and within the definitions of "combine" given in the Century Dictionary and in Corpus Juris, vol. 11, p. 1230; and that the combine disclosed in the evidence fell within the class prohibited by sec. 2 of the Act.

Section 4 of that Act and secs. 2, 4, and 29 of the Trade Unions Act, R.S.C. 1927, ch. 202, considered.

The evidence disclosed the formation by the defendants of a trade union, and sec. 29 declares that a member shall not be liable to criminal prosecution for conspiracy merely because the purposes of the union are in restraint of trade; but here it was not the purposes of the union which were called in question, but the operations of its individual members, which exceeded the legitimate purposes of a trade union.

The evidence also established such a conspiracy as is defined in various clauses of sec. 498 of the Code; and the provisions of sec. 497 cannot avail as a defence.

*Stinson-Reeb Builders Supply Co. v. The King*, [1929] S.C.R. 276, and other cases, referred to.

The defendant S., who was the originator and Commissioner of three organisations which operated as combines was found guilty of all the offences charged in the indictment.

The defendants O'C., B., and W. were acquitted, notwithstanding the provisions of sec. 69 of the Code, because, upon the evidence, there was no participation or complicity by them in the offences established.

The defendants P. and W., having played an active part in all the transactions and actively participated in all the combines, were found guilty on all the counts.

The three defendants found guilty were sentenced to pay fines and in default of payment to imprisonment.

THE defendants, Singer, O'Connor, Weinraub, Belyea, Paddon, and Ward, were indicted for forming and operating an illegal combine and for conspiracy, etc.

March 3 and following days. They were tried before WRIGHT, J., sitting without a jury, at Sandwich.

D. L. McCarthy, K.C., A. G. Slaght, K.C., and J. C. McRuer, K.C., for the Crown.

L. M. Singer, K.C., one of the defendants, appeared in person and as counsel for the defendants Weinraub and Belyea.

W. F. O'Connor, K.C., also a defendant, appeared in person.

J. H. Clark, for the defendants Paddon and Ward.

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March 23. WRIGHT, J.:—The accused were tried before me at Sandwich, upon an indictment containing seven counts, charging the following offences, viz.:—

1. That they were parties or privies to or knowingly assisted in the formation or operation of a combine as defined in sec. 2, subsec. 1 (c), of the Combines Investigation Act, R.S.C. 1927, ch. 26.

2. That they were parties or privies to or knowingly assisted in the formation or operation of a combine as defined in sec. 2, subsec. 1(c) (iv), of the Combines Investigation Act.

3. That they were parties or privies to or knowingly assisted in the formation or operation of a combine as defined in sec. 2, subsec. 1(c) (iii), of the Combines Investigation Act.

4. That they were parties or privies to or knowingly assisted in the formation or operation of a combine as defined in sec. 2, subsec. 1(c) (i), of the Combines Investigation Act.

5. That they did unlawfully conspire, combine, agree or arrange together and with one another, and with certain persons named in the indictment, to unduly prevent or lessen competition in the purchase, barter, sale or supply of articles or commodities which may be the subject of trade or commerce, to wit, plumbers' supplies, etc., contrary to the provisions of the Criminal Code, sec. 498, subsec. 1 (d).

6. That they did unlawfully conspire, combine, agree or arrange together and with one another, and with certain other persons named in the indictment, to restrain or injure trade or commerce in relation to articles or commodities which may be the subject of trade or commerce, to wit, plumbers' supplies, etc., contrary to the provisions of the Criminal Code, sec. 498, subsec. 1(b).

7. That they did unlawfully conspire, combine, agree or arrange together or with one another and with certain persons named in the indictment, to unduly limit the facilities for supplying or dealing in plumbers' supplies, etc., contrary to the provisions of the Criminal Code, sec. 498, subsec. 1(a).

The Canada Plumbing and Heating Guild and the Dominion Chamber of Credits Limited were also included in the indictment, but the Crown elected to proceed separately against the last two companies, and the trial proceeded as to the individuals only.

The accused exercised the option given them by sec. 39 of the Combines Investigation Act and sec. 581 of the Criminal Code, and elected to be tried without the intervention of a jury.

The evidence was heard before me at the Sandwich sittings on the 3rd March, 1931, and following days, and at the conclusion of the evidence I postponed the delivery of judgment to a date named.

The accused, upon being arraigned, entered a plea of "not guilty," but during the progress of the trial they applied for leave to move to quash the indictment, under the provisions of sec. 898 of the Code.

Without granting leave to make such a motion, I heard argument on the same, but, after giving full consideration to the arguments advanced, I refuse to grant the leave sought, particularly in view of secs. 854 and 855 of the Criminal Code, which relate to such a case as the present.

Section 891 of the Criminal Code is directly relevant to the matter. Under that section the accused has the right, at any stage, to apply to have any count of the indictment which contains charges in the alternative divided, but no such application was made, and in any case I do not consider it should be granted, as the accused were in no wise prejudiced or embarrassed by the course adopted at the trial.

Counsel for the Crown stated that the case for the prosecution would be mainly, if not entirely, the same as that developed at the preliminary hearing, and there was no suggestion during the trial that the accused were in any way embarrassed or prejudiced in consequence of the form of the indictment or the lack of more specific charges.

I do not think the fact that the offences were stated in the alternative, under the particular circumstances of this case, leaves the indictment open to be quashed. The curative provisions of the section already cited might well be invoked in support of the indictment.

As this was stated to be the first prosecution under the Combines Investigation Act in this Province, it is eminently proper that the whole question should be fully considered, and with that object in view I postponed delivery of judgment until I had an opportunity to review and analyse the evidence, and consult the various authorities to which I was referred by counsel.

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The Act in question was recently declared by the Judicial Committee of the Privy Council to be *intra vires* of the Dominion Parliament, in a judgment delivered on the 29th January of the present year. The judgment of the Privy Council, which was delivered by Lord Atkin, traces the origin and history of the legislation so fully that I do not think it necessary to discuss the origin or history of the legislation in this judgment. The judgment referred to declared *inter alia* that the Act in question is one relating to criminal law: *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310.

Section 2 of the Act in question purports to define the combines which constitute criminal or indictable offences, but the language used is somewhat involved, and it requires close and careful study of the enactment to arrive at its purport and meaning. In attempting to arrive at its proper construction, one must keep in mind the rule of construction applicable to penal statutes and apply a strict construction to the same.

The logical and convenient method or procedure to be followed is first to determine whether there was a combine within the prohibitions of the Act, and in the next place to determine if the part taken by the accused in such combine renders them liable under the provisions of sec. 32 of the statute.

At this stage it is desirable to sketch the history of the various organisations leading up to the offences charged in the indictment in order that a proper conception of the situation may be obtained.

Prior to March, 1927, there was in existence, in Ontario, an association known as the Ontario Society of Domestic Sanitary and Heating Engineers. This association had been somewhat dormant for years, but at a convention held in Guelph in March, 1927, it was resolved to revive the association with a view to extend its usefulness.

At that convention the accused Belyea and Weinraub were elected as directors, together with one Baker. The latter is said by the witness Frankland to have outlined a new organisation, and plans were then laid to hold a meeting at a subsequent date, in order to get all the allied trades into one organisation. It was also suggested that a Commissioner with plenary power should be appointed as head of the organisation.

Next followed a letter dated the 22nd March, 1927, from Singer to Belyea in which suggestions were made by the former as to holding a conference to discuss the proposed new organisation.

On the 9th April, a meeting was held in the office of Singer, at which both Weinraub and Belyea were present. At this meeting it was tentatively arranged that Singer should be paid \$7,500 to organise and incorporate a new organisation. Following this meeting, a letter was written by Singer to Belyea under date of the 11th April, 1927, outlining the proposed objects of the organisation.

Next followed a series of speaking tours throughout the Province, in which Belyea and Weinraub took a leading part. This was to interest the members of the different trades affected or proposed to be affected by the formation of the new organisation.

Windsor, among other centres was visited, and a meeting was held of those interested, at which the accused Belyea and Weinraub were present.

As a result of this campaign a largely attended convention was held at Hamilton on the 11th June, 1927, at which applications for membership were received from a large number of persons, firms or corporations, and it was then decided to proceed to form a new association and to have a Commissioner appointed to guide and govern its affairs.

Letters of incorporation of the Canadian Plumbing and Heating Guild were granted on the 30th June, 1927. Prior to the granting of this charter, the sum of \$7,500 was paid to Singer as his charge for his services in connection with the organisation and incorporation of the Guild.

The purposes and objects of the Guild as set forth in the letters of incorporation did not disclose the real purposes or objects as shewn by the future operations of the Guild. Two of the accused, namely, Belyea and Weinraub, were among the incorporators of this Guild.

The membership in the Guild included manufacturers and wholesalers of plumbing supplies, but shortly after the incorporation these parties became restless, owing, it was stated at the trial, to a legal opinion received by them to the effect that it was illegal for them to be in the same organisation as the master plumbers, when the purpose of the organisation was to enhance

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the price of material or to fix a common price or in any way to act against the public interest.

On the 16th August, 1927, Singer addressed a letter to the wholesalers and manufacturers, requesting a conference with them on the 24th August, 1927. This conference was held, and Singer outlined in detail his plan to incorporate a new organisation under the name of the Dominion Chamber of Credits, with the avowed object of improving the credit situation throughout the plumbing and heating industry, whereupon the following resolution was passed:—

“That this meeting of manufacturers and jobbers recommend to manufacturers and jobbers of plumbing and heating goods that they become members of the Dominion Chamber of Credits Limited without any further obligation than their subscription.”

It was also arranged that the application fees already paid by manufacturers and jobbers to the Guild should be transferred to the new organisation.

Letters of incorporation of the Dominion Chamber of Credits were granted on the 8th September, 1927. Singer was one of the incorporators. From what appeared in the evidence at the trial, and the subsequent operations of the two organisations, it is quite clear that the new organisation was formed for the purpose of having two organisations—one consisting of master plumbers, and the other of manufacturers and jobbers, acting under the direction of one Commissioner and in close contact and co-operation with each other.

A convention was held in Toronto on the 26th and 27th January, 1928, which was addressed by O'Connor at considerable length, and this address will be referred to later in this judgment, as it is one of the grounds upon which the Crown contends that the accused O'Connor became liable to be indicted and convicted.

Shortly after this meeting, Singer conceived the idea of another organisation, and on the 13th April, 1928, it was arranged that a new organisation to be known as the Amalgamated Builders Council should be registered under the Trade Unions Act, and the same was duly registered on the 8th June, 1928, with the Deputy Registrar-General of Canada, as required by the Trade Unions Act. Of this organisation, the accused Belyea was appointed president and Weinraub secretary.

The president, on the 9th July, 1928, appointed Singer as Commissioner under rule 3 of the by-laws of the new organisation.

On the 19th July, 1928, Singer and O'Connor interviewed the Department of Labour at Ottawa and submitted in writing a document known as "Canadian Cartels," which contained distinct references to the Amalgamated Builders Council, and will be referred to later in this judgment. The object of their interview was to obtain some kind of recognition from the Department of their organisation. The document is important not for that reason but for certain statements contained in the draft cartel relating to the activities of Singer and O'Connor in connection with the formation and operation of the organisation.

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Certain master plumbers residing in Windsor and the adjoining border cities made application for a charter for a local section of the Amalgamated Builders Council, and on the 25th September, 1928, a charter was granted to the branch at Windsor to be designated as local section No. 112. Of this local section Paddon and Ward were members, and Ward was duly elected secretary. Throughout its entire existence, Ward and Paddon were most active in the interests of the local section—indeed, they appear to have been the most active of all the members.

This organisation continued to function until the 31st December, 1929, when, after an investigation under the Combines Investigation Act, the certificate of resignation of the Amalgamated Builders Council was cancelled by the Secretary of State and Registrar-General of Canada.

This is, in short, the history of the various organisations.

The evidence disclosed that they were the creation of Singer, and that his was the guiding hand throughout the entire operation of the different organisations.

Under the terms of the by-law which will be referred to, he was vested with wide powers, and the evidence disclosed that he exercised them to the limit.

At this stage it is convenient to consider the method or manner in which the three organisations were interlocked or inter-related, as well in regard to their objects as to their officials and members.

The Canadian Plumbing and Heating Guild was the first to be incorporated. By reference to its charter it will appear that its purposes or objects were very wide and embraced almost every conceivable subject relating to the plumbing industry. Two of the significant objects are as follows:—

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“(b) To associate itself and co-operate with any other guild, bureau, association, organisation, person, firm or corporation whenever the board of directors shall think it desirable or conducive to the interests of the Guild so to do.

“(c) To consult, solicit and negotiate with as prospective members or associate members any person . . . engaged, interested or concerned either directly or indirectly in the production, distribution, planning, laying out, installation or repair of plumbing, sanitary ventilating, refrigerating, heating or steam-fitting equipment supplies or materials or anything pertaining thereto, and to make agreements,” etc.

Of these organisations Singer was the Commissioner, Belyea the president, and Weinraub the secretary. Paddon and Ward were members.

Here I think it is opportune to refer to the powers of the Commissioner as defined in clauses 2 and 3 of by-law No. 1, which reads as follows:—

“2. The general management shall be entrusted to a Commissioner, who shall establish and maintain the Guild and supervise and control its policies and affairs according to his best judgment, and in that behalf shall do and cause to be done such acts and things as he may from time to time think necessary or desirable, and shall employ such help as he may deem necessary. He shall investigate prevailing conditions in the plumbing and heating industry and shall oversee the gathering and distribution of information. He shall examine prospective members as to their eligibility and shall admit to membership those who are eligible and shall expel from membership those who become ineligible.

“3. The Commissioner shall have the right to veto any resolution or by-law of the board of directors or any decision of any officer.”

This organisation had officials known as “zone chairmen” in the various centres. In Windsor, one Pragnell was the first of such chairmen, but he was later succeeded by Paddon, one of the accused. Ward, one of the accused, was secretary of the Windsor group for a time.

Upon the argument an attempt was made to dissociate the Windsor group from the parent organisation, but the evidence clearly established that the Windsor group was composed solely of members of the Guild, and Singer, in his capacity of Commissioner, attended some of the meetings, and delivered ad-

dressess to the members. The zone chairman of Windsor always presided at the meetings of the Windsor group when present, and it is quite clear that this group was recognised by the chief executive officers of the Guild as a constituent though informal branch of the organisation.

Next in chronological order is the Dominion Chamber of Credits, of which Singer was one of the incorporators and one of the directors. No minutes of this organisation were produced at the trial; and, while the general purposes or objects as set forth in the letters of incorporation appear to be similar to those of a credit bureau, the following significant clause appears among those objects:—

“(g) To subscribe to, become a member of, become associated and co-operate with any other association or corporation, whether incorporated or not, whose objects or purposes are altogether or in part similar to those of the company, and to procure from and communicate to any such corporation such information as may be likely to further the objects of the company.”

As already indicated, this organisation was formed so as to permit the manufacturers and jobbers who were members of the Guild to retain their connection with it under the guise of another body. The fees already paid by them to the Guild were to be transferred to the new organisation.

The last organisation to be formed was the Amalgamated Builders Council, which was registered under the Trade Unions Act, R.S.C. 1927, ch. 202. Had it confined its operations to those authorised by that Act, no objection could well be taken, but from its operations it is clearly evident that the purpose of those responsible for its creation and operation was to avail themselves of any immunity provided by this Act, and, if possible, evade the provisions of the Combines Investigation Act and the Criminal Code.

Of this organisation Singer was the duly appointed Commissioner, Belyea was the first president, and Weinraub was the first secretary-treasurer. As already stated, a charter was issued to the Windsor group under the title of local section 112. Of this local the accused Ward was secretary and the accused Paddon one of the most active members.

At the convention of the 3rd September, 1928, it was decided unanimously that henceforth only members of the Amalgamated Builders Council actually engaged in the plumbing and heating industry should be eligible to be or to continue members of the

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Guild. This policy was also stated in a circular letter of the 7th September, 1908, by Singer in his capacity as Commissioner, in the following words:—

“No member will be admitted to the Amalgamated Builders Council unless he is a member of the Guild. Membership in the Guild will be conditional upon membership in the Amalgamated Builders Council.”

From the foregoing it is manifest that these three organisations were formed and operated for the express purpose of controlling the plumbing and heating industry in its various branches, including manufacturing and jobbing, and to further that end absolute control and direction of these organisations were vested in one individual styled “Commissioner,” which in itself was a vicious and indefensible system.

The inquiry will now be directed to the various acts and matters alleged by the Crown to constitute a contravention or violation of the statutes referred to in the indictment.

In the first instance there is the act of bringing into one organisation the manufacturers, jobbers, and master plumbers so as to create or control a monopoly of the sale of plumbers’ supplies and the plumbing industry generally. This was in the first instance effected by the organisation of the Canadian Heating and Plumbing Guild, and the other two organisations were merely to further that object.

That there was a fixing of a common price was shewn by the action of the members of the Guild in Windsor, at their meeting on the 12th September, 1928, when the following resolutions were carried:—

“Whereas it is unanimous and for the best interest of all concerned that we figure on all jobs up to \$5,000 an overhead of 15 per cent. and a profit of 10 per cent. on the cost of all material and labour. Carried and signed by every member present.”

“That the secretary inform all members of the Guild that we have arrived at the 15 and 10 method of figuring.”

“That it is the best interest of all members of this Guild to charge at the rate of \$1.75 per hour for plumbers working on jobs.”

The accused Paddon was chairman at this meeting.

At the meeting of the Windsor Guild held on the 5th January, 1928, a committee was appointed to report as to prices, and its report was adopted. This report was filed at the trial as

exhibit No. 108. The material parts of it may be summarised thus:—

(1) That labour on repair-work be charged at \$1.75 per hour for plumbers or steam-fitters and \$1 per hour for helpers.

(2) That on all contract work 20 per cent., plus 2 per cent., be added to the cost.

It also recommended certain fixed prices for labour.

The item of 2 per cent. mentioned in this report was, as appears from the evidence, collected for the purpose of the Guild. Thus the public was forced to pay tribute to the Guild.

At the meeting of the 10th May, 1928, a new committee was appointed to work out a new schedule and the new schedule was adopted.

On the 31st May, the schedule of prices recommended in the report of the heating committee was adopted.

The minutes of the meeting of the 5th July, 1928, also shew that the schedule of prices recommended by the heating committee was adopted.

The evidence established that at one stage of the operations of this organisation schedules were adopted by the members whereby 30 per cent. was to be added to the cost of the materials for labour, and to the total cost of labour and materials a further addition of 30 per cent. was to be made as profit.

It was strenuously argued by counsel for the accused that the foregoing resolution and the methods adopted in pursuance thereof were not the fixing of a common price.

In my view, it was substantially the fixing of a common price, as the method of computing price was standardised and the cost of labour was fixed.

Another branch of the case concerns or includes the operations of these organisations as creating a monopoly or limiting competition in the plumbing and heating industry at Windsor.

At a meeting of local section 112, held on the 4th October, 1928, at Windsor, a resolution was adopted in the following terms:—

“Resolved that the members of this local ought not to purchase and after communication of this resolution will not purchase from any supplier who directly or indirectly sells plumbing, heating or radiation fixtures, goods, materials or systems in or about or for installation or use in or about the border cities to persons, firms or corporations other than members of this local.”

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The minutes shew that the secretary-treasurer was directed to communicate the foregoing resolution to such suppliers as customarily sell within the territory of the local, and this was done accordingly.

This resolution was either drafted by Singer or submitted to him for approval, as appears from his letter to Paddon of the 3rd October, 1928.

The evidence established that this resolution was acted upon in many instances, and non-members of the Amalgamated Builders Council at Windsor found great difficulty in procuring supplies and were greatly embarrassed in their business operations.

From time to time manufacturers and wholesalers of plumbing and heating supplies were furnished with lists of members of the local section 112 of the Amalgamated Builders Council, and there was a tacit if not an express agreement that the dealers would refuse to sell to non-members, and this was actually done in many instances.

Local section 112 of the Amalgamated Builders Council, under the advice and with the approval of Singer, made a written agreement (drawn by Singer) with local union 552 of the United Association of Plumbers and Steamfitters of the United States and Canada, dated the 26th September, 1928, whereby the former agreed to employ only members of the latter union, and the latter on its part agreed that its members would not work for any non-members of the former.

The evidence established that both parties to this agreement carried out its provisions.

In order to finance these organisations, a levy was made upon the members, varying at times according to the volume of business done by the members. If default was made by a member in payment of his assessment, he was liable to expulsion by the Commissioner, Singer, and this power was exercised in several instances. The resulting effect was that the expelled member was precluded from obtaining labour or supplies wherewith to carry on his operations.

These various activities built up an autocratic and despotic organisation of the plumbing and heating industry in Windsor, and the problem now presented for solution is as to whether or not the provisions of the Combines Investigation Act have been violated by the individuals now on trial.

Section 32 of the Combines Investigation Act, R.S.C. 1927, ch. 26, declared it an indictable offence on the part of any one to be a party or privy to or knowingly assist in the formation or operation of a combine within the meaning of the Act.

There is no express definition of what constitutes a combine found in the Act itself, although sec. 2 defines the class of combines which is prohibited. Applying the rule of construction that words in the statute are to receive their ordinary meaning unless a contrary intention is indicated by the context, I interpret the word "combine," as used in subsec. 1 of sec. 2, to mean a combination or agreement. This is the meaning assigned to the word "combine" in the Century Dictionary.

A more extended definition or meaning is given in Corpus Juris, vol. 11, at p. 1230, where a combine is stated to be "a combination, contract, understanding, or agreement, expressed or implied, between two or more persons, corporations, or firms and associations of persons."

I have no hesitation in holding that the evidence in this case established that there was a combine falling within these definitions.

The next step is to determine if this combine has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others.

The deductions I have already drawn from the evidence clearly establish that the combine in this case falls within the class indicated in this subsection.

However, the statute requires other conditions to bring a combine within the Act.

To come within the statute, the combine must also be a merger, trust or monopoly so-called, or (a) result from any actual or tacit contract, agreement, arrangement or combination which has or is designed to have the effect of any of the results set forth in paras. (i), (ii), (iii), (iv), (v), or (vi) of sec. 2 (1) (c).

The indictment does not charge that the combine under review was a merger, trust, or monopoly; and, while the evidence appears to establish that there was a virtual monopoly created by the workings of this combine, it is not necessary for me to decide this point.

The indictment does, however, allege that the combine resulted from an actual or tacit contract, agreement, arrangement,

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or combination which has or is designed to have the effects set forth in paras. (i), (iii), (iv), and (v) of sec. 2 (1).

The evidence, in my view, as already indicated, clearly establishes that there was an actual or tacit agreement, arrangement, or combination, but the question as to the actual or designed effect of such combine is still open to decision.

In my opinion the evidence establishes, and I so find, that the combine did have or was designed to have the following effects:—

(a) Limiting facilities for supplying or dealing in plumbing and heating supplies within the purview of subsec. 1.

(b) Fixing a common price within the meaning of subsec. 2.

(c) Enhancing the price or cost of articles within the meaning of subsec. 4.

(d) Preventing or lessening competition or substantially controlling, within the city of Windsor and adjoining district, the purchase, sale, or supply of plumbing and heating materials.

Summarising these findings, the result is that I hold the combine disclosed in the evidence falls within the class of combines prohibited by sec. 2 of this Act.

A somewhat novel argument was addressed to me at the trial on behalf of the accused, to the effect that the Combines Investigation Act was directed solely against combines dealing in articles or commodities of commerce, and did not apply to plumbing contracts, as, when the plumbing contracts were completed, the materials furnished were attached to buildings, and thereby became real estate. The fallacy of this argument becomes apparent on merely stating it. It is a sufficient answer to say that a plumbing or heating contract includes goods sold or supplied as well as work done.

Stress was also laid by counsel for the accused on the provisions of sec. 4 of the Combines Investigation Act, and secs. 2, 4, and 29 of the Trade Unions Act, R.S.C. 1927, ch. 202.

Dealing first with sec. 4 of the Combines Investigation Act, it clearly applies to combinations of workmen or employees only, and the accused are certainly not in that class.

The sections of the Trade Unions Act present greater difficulty.

Section 2 defines a trade union.

Section 4 relates to civil actions only.

Section 29 declares that a member of a trade union shall not be liable to criminal prosecution for conspiracy or otherwise mere-

ly because the purposes of the trade union are in restraint of trade.

In the present instance it is not the purpose of the so-called trade union (Amalgamated Builders Council) which is called in question, but the operations of its individual members, which greatly exceed the legitimate purposes and objects of a trade union.

It would be a travesty on justice if acts and transactions such as those disclosed in the evidence in this case could be justified or excused merely because the offenders were members of a trade union.

Thus far I have dealt with the evidence mainly from the view-point of the Combines Investigation Act, but the indictment in counts 5, 6, and 7 contains charges under the provisions of sec. 498, subsec. 1 (a), (b), and (d) of the Criminal Code.

The evidence applies to these charges as well as to those already reviewed, and the findings of fact will also apply to these counts.

The evidence establishes a conspiracy to unduly limit the facilities for supplying and dealing in plumbing and heating supplies.

I need only refer to the evidence as to the arrangement restricting the sale or supply of materials to members of the organisations in question, which clearly establishes an offence under this section.

The evidence also establishes a conspiracy to unduly prevent or lessen competition in the sale or supply of plumbing and heating materials within the meaning of para. (d) of sec. 498.

I find upon the evidence that there was a conspiracy to restrain or injure trade or commerce as defined in para. (b).

Section 498 contains a saving clause in subsec. 2, similar in its terms to sec. 4 of the Combines Investigation Act, and, as I have already stated my views on the scope and meaning of this provision, it is unnecessary to repeat them here.

It is strenuously argued that the provisions of sec. 497 apply to the situation in this case.

It was contended by counsel for the Crown, and I think properly, that the provisions of sec. 497 relate only to offences charged under para. (b) of sec. 498.

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It will be noted also that sec. 497 of the Criminal Code is in practically the same language as sec. 29 of the Trade Unions Act, which has already been considered.

It is quite evident that it was never intended by Parliament that sec. 497 should operate as a complete defence to charges of all the offences created by sec. 498 of the Code.

As already stated, it is not the purposes of the trade union that are attacked in these proceedings, but the acts and operations of some of the members which are entirely outside the ambit of a trade union, and in this view sec. 497 cannot avail as a defence.

The situation here resembles in many respects that dealt with by the present Chief Justice of Ontario in *Rex v. McMichael* (1907), 18 Can. Crim. Cas. 185, where there was an agreement in writing similar in its provisions and objects to that disclosed in the present case between the master plumbers and the supply houses, and it was held that such an agreement amounted to a conspiracy within the provisions of the Criminal Code.

The decision of the Supreme Court of Canada in *Stinson-Reeb Builders Supply Co. v. The King*, [1929] S.C.R. 276, establishes that the proper test to be applied in a prosecution under sec. 498 of the Criminal Code is the injury to the public notwithstanding any advantage to the members of the combine.

Some of the other authorities which are relevant to the issues here are: *Rex v. Elliott* (1905), 9 O.L.R. 648; see particularly the judgment of Osler, J.A., at p. 661, as to the meaning of "unduly;" *Weidman v. Shragge* (1912), 46 Can. S.C.R. 1; *Attorney-General for Ontario v. Canadian Wholesale Grocers Association* (1923), 53 O.L.R. 627; *Rex v. Master Plumbers etc. Association* (1907), 14 O.L.R. 295.

The conclusion having been arrived at that offences were committed against both the Combines Investigation Act and the Criminal Code, it now becomes necessary to decide as to the complicity or participation of the accused in the offences established.

I shall deal first with the case of the accused Singer. I have already, in discussing the evidence, pointed out that he was the originator of the three organisations referred to; that he was the Commissioner of the Canadian Plumbing and Heating Guild, the Dominion Chamber of Credits, and the Amalgamated Builders Council; that he directed the operation of all three organisations, not as an ordinary member, but as a paid Commissioner, receiv-

ing from these organisations during their existence the sum of approximately \$40,000 by way of salary, in addition to his expenses. He had the veto power over all the by-laws and proceedings of these organisations; he drafted the agreements and resolutions for the Windsor local 112 of the Amalgamated Builders Council; he frequently addressed meetings not only of the associations in general conference assembled, but also the meetings held at Windsor, and was in close touch with the workings of the organisations and the action of the members. There can be no doubt that he was a party and privy to and knowingly assisted in the formation and operation of all the combines which I have already found to have existed. In view of this, he should be found guilty of all the offences charged in the indictment. The methods adopted by him shewed a studied and deliberate effort to effect an unlawful result under the pretence of keeping within the letter of the law.

The case of the accused O'Connor rests upon a different basis. He was retained by Singer as his counsel, and from time to time advised the latter in reference to Guild matters. He gave two written opinions which were put in as evidence as to how far traders or manufacturers might lawfully go by way of conference or arrangement with respect to actions possibly in restraint of trade, and as to the power of traders or manufacturers lawfully to enhance the prices of their commodities. These opinions were such as might be obtained from any members of the legal profession. He also addressed a meeting of the Canadian Plumbing and Heating Guild at its annual convention at Toronto on the 25th January, 1928, in which he made an attack upon the Combines Investigation Act and also on sec. 498 of the Criminal Code, but did not directly advise evasion or disregard of the provisions of these Acts. In that address he stated, among other things, that the Commissioner, Singer, had explained to him his conception of the Guild, and further stated that he had an intimate connection with the Commissioner, and had been since the birth of the Guild in daily contact with its affairs. He further stated, as the result of close scrutiny of the charter documents and actions of the Guild since incorporation, that it was a lawful association, lawfully organised, lawfully conducted, and that every action thereof up to that time could be shouted from the housetops without fear.

In conjunction with Singer he also appeared before the De-

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partment at Ottawa and presented a draft document known as the "Canadian Cartels." In that document it was stated that Singer and O'Connor in the beginning conceived and elaborated the idea which Amalgamated Builders Council exemplified.

For these statements and declarations by O'Connor the Crown seek to hold him liable as a party or privy to or knowingly assisting in the formation or operation of these combines.

I am of the opinion, however, and so hold, that, where the formation of an organisation is for professedly legitimate objects, but the organisation or its members afterwards participate in unlawful operations, the party to the original formation is not criminally liable unless and until he participates either as party or privy to or knowingly assists in the illegal operations of the organisation, and I cannot find on the evidence here any participation by O'Connor in the illegal operations of these organisations or of the members thereof.

In arriving at this conclusion, I have in mind the provisions of sec. 69 of the Criminal Code, but, notwithstanding that section, I cannot find upon the evidence that there was any participation or complicity by O'Connor in the offences established in evidence, and therefore a verdict of not guilty must be found in his case.

I have had some difficulty in the cases of the accused Belyea and Weinraub. Undoubtedly these men took an active part in the formation of the organisations under review. But, applying the same test as that applied in the case of O'Connor, I cannot find on the evidence any complicity or participation on the part of these two men, in any of the combines or conspiracies found to exist.

Undoubtedly Belyea took a particularly active part in the organisation of the Windsor branch, and was largely responsible for the formation of the organisation known as the Canadian Heating and Plumbing Guild, but I cannot find any evidence that he was a party or privy to or knowingly assisted in any of the illegal acts committed by the members of the Windsor group.

There was no evidence given shewing that there was any participation by Belyea in operations outside of Windsor, further than taking part in the general meetings of the members or directors of the different organisations.

What I have said as to Belyea applies also to Weinraub. He took a less active part than Belyea, and there is no evidence that connects him with any of the illegal operations.

Holding these views, I must record a verdict of not guilty as against these two accused.

As to Paddon and Ward, there can be no doubt, and I so find, that these two men played an active part in all the transactions that took place in Windsor. Paddon was particularly active in that respect, as his correspondence with Singer and other parties discloses. Ward at times acted as secretary to the Windsor group and had a full knowledge of everything that was going on, and actively participated in the workings of the combines.

I find upon the evidence that these two men were parties to the combines, and were also parties to the conspiracies which were entered into. However, Paddon and Ward are laymen and acted generally under the advice and direction of Singer; and, while they are no less guilty on that account, yet in awarding punishment I propose to take cognizance of these circumstances.

I find the accused Singer guilty upon the 1st, 2nd, 3rd, and 4th counts of the indictment, and for such offences I impose a fine of \$4,000, and I direct that in default of payment of such fine he be imprisoned for the period of 4 months.

I also find the accused Singer guilty upon the 5th, 6th, and 7th counts of the indictment, and in respect thereof I impose a fine of \$4,000, and in default of payment thereof I direct that he be imprisoned for the period of 4 months.

I find the accused Paddon and Ward guilty on all the counts of the indictment. For the offences set forth in the 1st, 2nd, 3rd, and 4th counts, I impose a fine of \$400 on the accused Paddon and a further fine of \$400 in respect of the offences set forth in the 5th, 6th, and 7th counts, and in default of payment I direct that he be imprisoned for a term of 2 months. I impose on the accused Ward a fine of \$400 for the offences set forth in the 1st, 2nd, 3rd, and 4th counts of the indictment and a further fine of \$400 in respect of the offences set forth in the 5th, 6th, and 7th counts, and in default of payment I direct that he be imprisoned for the term of 2 months.

I find the accused O'Connor, Belyea, and Weinraub not guilty on all counts of the indictment.

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March 28. *Criminal Law—Murder—Conviction—Appeal—Alibi—Evidence—Appellant not Testifying—Canada Evidence Act, sec. 4 (5)—Judge's Charge—Alleged Misdirection and Nondirection—Competency of Witness—Rejection of Evidence Tendered—No Substantial Miscarriage of Justice—Criminal Code, sec. 1014.*

The prisoner was convicted of murder and appealed from his conviction upon the grounds of misdirection and nondirection and the improper admission and rejection of evidence. The principal defence was an alibi:—

*Held*, by the majority of the Court, that none of the objections was entitled to prevail, and the appeal must be dismissed.

The prisoner did not offer his own evidence; by sec. 4 (5) of the Canada Evidence Act, R.S.C. 1927, ch. 59, that cannot be commented upon to the jury; but it is a factor which must be considered by an appellate court; and, the court being by sec. 1014 of the Criminal Code required to dismiss an appeal unless it is satisfied that there was a miscarriage of justice, his failure to explain facts which placed a heavy onus upon him could not be ignored—the law does not forbid jurors to use their intelligence and to consider the absence of denial or explanation.

C., a witness at the trial, deposed to incriminating statements made to him by the prisoner. Counsel for the defence tendered evidence to shew that this witness had manufactured evidence in another case and also the evidence of medical men to shew that he was of unsound mind. This evidence as to specific collateral facts was properly rejected.

The mental capacity of a witness must be determined, if at all, upon the procedure known as the *voir dire*.

It could not be said that the trial Judge in his charge failed to put the defence in full force before the jury. He told the jury that the evidence for the defence, if accepted by them in its entirety, and if they believed it, went to establish an alibi. "You will consider first the question of the alibi, and if you are satisfied in regard to the alibi . . . that is the end of this case." That instruction was proper.

*Rex v. Paris* (1922), 49 N.B.R. 400, 38 Can. Crim. Cas. 126, considered, and compared with *Rex v. Finch* (1916), 12 Cr. App. R. 77. *Clark v. The King* (1921), 61 Can. S.C.R. 608, 623, applied.

There was no error in the charge of sufficient gravity to lead to the belief that a miscarriage of justice had occurred.

*Per* MULLOCK, C.J.O., and GRANT, J.A. (dissenting):—The charge was erroneous and defective in several respects, the summing-up was not fair to the appellant, and may have caused a miscarriage of justice, and therefore the conviction should be quashed and a new trial directed.

AN appeal by the prisoner from his conviction, upon trial before JEFFREY, J., and a jury, of the murder of one Samuel Goldberg on the 5th March, 1930, in Toronto. The grounds of appeal were misdirection and nondirection of the jury, especially in regard to an alibi set up, and the improper admission and rejection of evidence.

tion of evidence. The appeal was upon questions of law, and the prisoner also moved for leave to appeal upon the facts.

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March 12 and 13. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*I. F. Hellmuth*, K.C., for the appellant. The learned trial Judge erred in refusing to admit evidence tendered by the appellant as to the character and credibility of Creighton, a Crown witness, who gave damaging evidence against the appellant. The appellant should have been permitted to produce evidence that Creighton had fabricated evidence in other matters, and that he had been attended by two doctors for a nervous and mentally abnormal condition, i.e., insane imaginings of all kinds. In the circumstances here, the denial by Creighton in cross-examination that he is a manufacturer of evidence amounts to nothing. The appellant is entitled to shew to the jury that it is a fact that the witness is a manufacturer or fabricator of evidence: *Phipson on Evidence*, 7th ed., p. 463; *Regina v. Brown and Hedley* (1867), L.R. 1 C.C.R. 70; *Mawson v. Hartsink* (1802), 4 Esp. 102; *Stebbing v. London and North-Western Railway Co.* (1899), 63 J.P. 138. The evidence of Lena Gordon, wife of Rabbi Gordon, was improperly admitted because there was no identification of the man in the grey coat and cap to whom she referred. Even though it was excluded when objection was taken by counsel for the accused, the harm had been done as far as the jury was concerned. The learned trial Judge erred in his charge to the jury, as a whole and in certain particulars, in not presenting the defence as fairly and clearly as the Crown's case was presented. There was no attempt to analyse the evidence of the alibi except to throw doubt on the time. The alibi depended to a large extent on the fact that it was contemporaneous with the crime and that it was related shortly afterwards by both the accused and two other witnesses (the Rotenbergs) to the detective. The latter fact, as brought out in the evidence of the detective, was not put to the jury. The learned trial Judge should not have said in his charge, "Could there be any mistake as to the night?" He also erred in stating that Levitt had sworn that he had seen the accused on the night of the offence in a grey coat. The evidence of the alibi was not put in any other way in the charge than to discredit it. The learned trial Judge should have instructed the jury that, if the alibi evidence created in their minds any reasonable doubt

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as to the accused being the one who committed the crime, then he must be acquitted. The usual direction as to reasonable doubt generally is not sufficient. The jury should be directed that they must first deal with the alibi and then with the rest of the case: *Rex v. Paris* (1922), 49 N.B.R. 400, 38 Can. Crim. Cas. 126. The charge as a whole is objected to in that the learned trial Judge attributes to Budd a statement of Steinberg's statement to him that he had set fire to the building to destroy the evidence. Budd did not make this statement. The evidence of Mrs. Goldberg was such as to be properly considered by the jury on the question of motive. Her evidence does not shew that the accused was in any way antagonistic to the deceased; and further it is contradicted by Mrs. Steinberg, who was present. The learned trial Judge does not refer to this contradiction by Mrs. Steinberg. He belittled to the jury the error of the Hungarian in estimating the height of the man in the grey coat while emphasising the fact of the grey coat. If a case of misdirection is made out, the onus is on the Crown to shew that no reasonable jury could have come to any other conclusion upon a proper charge.

*Edward Bayly*, K.C., for the Crown. Under sec. 1014 of the Code, this Court has not to consider the weight of the evidence but only whether the requirements of the section have been complied with. On the question of the adequacy of the charge reference to *Melyniuk and Humeniuk v. The King*, [1931] S.C.R. 143; *Rex v. Coppen* (1920), 47 O.L.R. 399, at pp. 405, 406; Phipson on Evidence, 7th ed., p. 133. With regard to the error in estimation of height by the Hungarian, that was a slight error which was easily justified from the circumstances and distance of observation. As to the evidence alleged to have been improperly rejected, there was no foundation laid by the accused for the introduction of evidence of bad reputation: Phipson on Evidence, 7th ed., p. 458. The evidence of Davidson was not admissible to deny collateral facts. The answer of a witness must be taken as final with the single exception of questions as to a previous conviction: Roscoe's Criminal Evidence, 15th ed., p. 117. If the evidence of the physicians was seriously tendered, it has been laid down that even a lunatic can give evidence in his lucid moments: Archbold's Criminal Pleading, 28th ed., p. 469. The legal and mental competency of a witness is for the trial Judge to decide: Roscoe's Criminal Evidence, 15th ed., p. 134. As to the improper admission of evidence of Lena Gordon, the moment objection was

taken it was stopped. The learned trial Judge could do no more. Her story does not injure the accused. As to Budd, his name was not on the indictment, but the counsel for the appellant was notified that he was to be called. Under sec. 876 of the Code, with the leave of the trial Judge, any one may be called as a witness: *Rex v. McClain* (1915), 23 Can. Crim. Cas. 488; Archbold's Criminal Pleading, 28th ed., p. 505. The defence of the accused was put fairly to the jury. An alibi is recognised as a suspicious form of defence, especially when the accused does not go into the box. The learned trial Judge was right in criticising the alibi evidence in this case. It is not necessary for the trial Judge to refer to reasonable doubt more than once. He did so in his charge several times. The charge was elaborate, and the errors were trifling and not particularly against the accused.

*Hellmuth*, K.C., in reply. The onus is not on the accused to prove the alibi. It is sufficient if a reasonable doubt regarding it is raised in the minds of the jury. Reference to *State v. Harvey* (1895), 32 S.W. Repr. 1110; *State v. Taylor* (1893), 118 Missouri 153; *Rex v. Myshrall* (1901), 8 Can. Crim. Cas. 474, at p. 477; *Demers v. The King* (1926), 46 Can. Crim. Cas. 394.

March 28. MAGEE, J.A.:—The accused appeals from his conviction on the charge of murder of Samuel Goldberg on the 5th March, 1930, at Toronto. Careful perusal and notation of the evidence gives me no ground for questioning the propriety of the jury's verdict on the evidence before them. Goldberg, sitting at his desk, was shot in the head from above, the bullet passing through and lodging in the desk. Coal-oil from the can kept on the premises was then poured over his clothing and set on fire. It was only on later *post mortem* examination that it was discovered he had been shot. The bullet was found in a charred portion of the desk. A revolver was found hidden under a paper-bag such as others on the premises, and under a slab in a corner, from which the accused had shortly before removed stones. That revolver was proved to be the same which had belonged to the accused when he lived at Chesley. The ownership was not questioned. The witnesses identifying it were not even cross-examined. Then the fatal bullet is found to have been fired from that revolver, the striations on it being identical with those on another bullet found with it and fired from it. Five weeks previously a cartridge had been found in the shop by a workman and excited

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curiosity as to where it came from. The accused proposed to put it in the stove or strike it with a hammer, but was prevented, and his partner took it out and threw it into the neighbouring yard of W. E. Ross, and on search on the 18th March in that yard a cartridge is found, and that corresponds with the other cartridges in the revolver—and completes the number of cartridges it held. Two witnesses, fellow-prisoners of the accused, tell of statements made to them separately by him. To neither did he admit intentionally firing the fatal shot, but to one (Budd), whom he got to write two letters for him to his wife, he said that on the previous day he had an argument with Samuel Goldberg and had pointed the revolver unloaded at him, and that on the 5th March he had carried the revolver unloaded, and that Nathan Goldberg had gone out of the office and left him and Samuel Goldberg at the works, and he had gone out for 5 minutes, and on his return found the latter slumped on the desk. To the other fellow-prisoner (Creighton) he spoke of things looking bad, as the expert had identified the bullet, and he spoke of having gone out of the office and gone back again and having argument with the deceased, who threatened to throw him out, and he took out the gun for protection, and it went off accidentally, and then he set fire to the building and rolled the gun in paper and threw it in back of the place and then went up to a store. Thus the revolver he had in Chesley is traced to his possession on the day before and the day and the time of the murder on the evidence as it stands. Then he calls witnesses to say he never wore overalls at work, and his wife says he never owned overalls—and yet in a shed at the back of his house damp overalls are found under dry clothes with stains on the overalls, which on analysis are proved to be of human blood—and no attempt at explanation. His wife was at Chesley on that 5th March, but he has five sons, two at least of whom were old enough to be driving in a motor that evening. To his two fellow-prisoners he spoke of frequent disputes with the deceased, and it is shewn that since November, 1929, the two had no friendly intercourse but only spoke when necessary for business. Then, to go back, on that evening of the murder a neighbour—Csu Haj—sitting at his desk had seen a man approach the shop-door from the north and pull aside his overcoat and pull something out of his right trousers pocket, open the door and enter the shop. That man, he says, had a long grey overcoat and grey cap. Csu Haj had a clock on his desk and says it was

past half-past five. He says the man was taller than himself. He is 5 ft. 5 in. in height. The accused is 5 ft. 3 in. Not long afterwards, not an hour, he says, he saw the firemen. The fireman England says the alarm sounded about 6.30 p.m., and it would take 2 or 3 minutes to reach the fire. The wooden partition of the office, close to the desk, was burned through by that time. Several witnesses speak positively of the accused having a grey overcoat and cap. On the other hand, Mrs. Steinberg says he never had a grey overcoat but only a blue one. Max Rotenberg says he had a long blue overcoat—and not a grey one. Rotenberg's wife and the witness Shulman say he wore a dark overcoat. The jury might well on the evidence conclude whom they would believe and that he wore a grey overcoat.

But the main defence set up was an alibi, that from shortly after five o'clock till about seven he was at the shop of Max Rotenberg in Dundas-street, which is shewn to be 900 feet east from the scene of the murder. The evidence is that it would take less than 3½ minutes to walk there and also that it would take less than 1½ minutes to walk from the firm's shop to Steinberg's house. With regard to the alibi, without analysing the evidence it is sufficient to say it was for the jury to consider whom they would believe. The coroner says that the accused told him he had last seen Samuel Goldberg when he left the place in the neighbourhood of half-past five—and the defence witness Milgram says he saw the accused at the fire somewhere round 6.30 to 6.45. No one suggests a reason why the accused should spend nearly two hours in Rotenberg's store at that time of day. The Rotenbergs say he was accustomed to come in two or three times a week. The accused did not offer his own evidence, and the jury no doubt had that in mind as well as the bearing of his witnesses.

But the appellant complains of misdirection and nondirection of the jury and of rejection of evidence. To deal with the latter first, it turns upon the evidence of the witness Creighton, already mentioned, who deposed to statements made by the accused to him. He was sent to gaol on the 10th April, 1930, on remand on a charge of forgery in connection with a cheque for \$600. The charge was later withdrawn and he was discharged. He says he was not guilty. He had been and was still caretaker and one of the directors of an apartment building and he had been employed by Mr. Davidson, a solicitor, at a farm. On cross-examination he was asked about a motor accident law-suit in which

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1931. him which he admitted to be in his writing except the signatures,  
REX but both he said were dictated or directed by Mr. Davidson. One  
v. of them purported to be a statement by one Edna Lynch, such  
STEINBERG. as might be taken from a witness, and the other was an affidavit  
Magee, J.A. by one Hendrican of having served Edna Lynch with a copy of  
a subpoena—a third paper was a letter to “dear Edna,” signed  
“L,” which he admitted to be his writing, but also said it was  
written at Mr. Davidson’s instigation and he thought that it was  
written purporting to come from the plaintiff for the purpose of  
getting a girl named Edna to give evidence to get it signed. The  
letter asked her not to give information to the insurance people,  
and he would see she got \$1,000 if necessary. Creighton was also  
asked if he had reported to Mr. Davidson that Edna Lynch had  
gone to Windsor, and as a result the trial had to be postponed,  
and he denied having done so. He was not asked as to the truth  
of any of the statements in any of the three papers, and no ques-  
tions were asked of him as to any improper use to be made of  
any of them other than I have mentioned.

Then counsel for the defence called Marjory Cookman, whom  
he wished to identify as Edna Lynch, and he tendered her evidence  
and that of Mr. Davidson to contradict the statements of Creighton  
as to them, and, as he said, to prove by the latter that Creighton  
is in the habit of manufacturing evidence and to corroborate that  
by Cookman. Counsel for the defence (at p. 459) said: “What-  
ever the rule may be in regard to not calling a witness to con-  
tradict another witness on a collateral matter . . . that rule  
must give way in the interests of justice to the case where a Crown  
witness is called to establish an alleged confession, and that wit-  
ness can be shewn to have manufactured evidence and to be a  
manufacturer of evidence in another case. I cannot put my case  
any higher than that.” And he tendered the evidence. The  
learned Judge then asked, “Are you calling many more wit-  
nesses?” and was answered: “No; there may be after this a  
doctor, a medical witness, who has attended this man. That may  
be—I cannot say.” And (at p. 463): “I cannot say whether  
that is necessary or not. If this evidence will not be admitted, I  
take it that the other evidence will not, because it cannot be put  
on any different ground; because, if I cannot give this evidence,  
I could not put a doctor into the box to say that this man is  
*non compos*—you cannot break it up.” His Lordship: “I do not

know about that; I would not like to bind myself that far." And later (p. 465), "What do you intend to prove generally by this witness?" Counsel: "That the witness—that Mr. Davidson, for instance, as I am instructed—will say that he would not believe this witness on his oath, would not accept his statement, and will be prepared to contradict of course in that way the evidence that this witness in this matter received this dictated thing, but it came to him purely voluntarily, and that this man made the whole thing up, and that this man had fabricated evidence to his knowledge."

After adjournment of the court, the learned trial Judge announced that he considered the evidence tendered was not admissible, that the evidence it sought to disprove was collateral. Counsel: "Then I want to tender the evidence of doctors who have attended Mr. Creighton." His Lordship: "No, I will not admit that evidence." Counsel then formally tendered the evidence and that of Mr. Davidson and Mrs. Cookman.

The proposed evidence of the unnamed doctor was not put forward at the trial, and is not here shewn or suggested to be wider than thus tendered, and was in effect put on the same plane as that of Mr. Davidson and Mrs. Cookman.

The rule is clear that such proposed evidence as to specific collateral facts would not be admissible, and it was properly rejected.

As to misdirection it is objected that the matter of reasonable doubt with regard to the alibi set up was not sufficiently put before the jury. But time and again the jury were told that reasonable doubt must be resolved in favour of the accused. And if the learned Judge did not enter fully into the details of the alibi evidence for the defence, that was really an advantage to the accused, for the Judge in effect took all the evidence for the defence as proving the alibi, and as if there were no contradictions between the defence witnesses themselves, and left it to the jury to say which side they believed. And it cannot be said that he failed to put the defence in full force before them.

There is one matter that calls for reference. It is objected that the learned trial Judge, in dealing with the evidence of Budd (p. 489), spoke of Budd having told of the accused telling that he had had some trouble with him (Goldberg) a short time before, and that he set fire to the building to destroy the evidence. But the learned Judge did not say that Budd said that; what he said

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App. Div. was that, if they believed Budd's story as to Steinberg's statements  
1931. to him, then that was a cogent piece of evidence that he had a  
— REX revolver and carried it for a certain purpose and was evidence  
v. that he left the place shortly after or about 5 o'clock and returned  
STEINBERG. again to find his partner slumped over a desk killed—murdered.  
Magee, J.A. He had had some trouble with him a short time before, and he  
set fire to the building to destroy the evidence.

I would add with regard to the evidence of Budd that his unchallenged statement that at Steinberg's request he wrote for him two letters to his wife goes far to render probable the statements he says were made to him. Budd did not volunteer the evidence. He was questioned by detectives after his name had been incidentally mentioned at the first trial by a witness under examination by counsel for the defence. Budd himself seems to have thought the detectives learned of him through the two letters to Mrs. Steinberg.

As to Creighton there is no suggestion that he has any interest to serve by giving his evidence—which he first disclosed to a friend of his in presence of another person whom he did not know to be an officer of justice.

I would dismiss the appeal.

HODGINS, J.A.:—As I have in *Rex v. Silverstone* (1931), *ante* 50, expressed my view as to the treatment which should be accorded to a Judge's charge, it is unnecessary to add anything here except that my view applies, as well, to a serious case such as this, and tried by a Judge experienced in criminal matters, as to a less important case. I think the learned Judge fulfilled entirely at the trial of this prosecution the obligation laid upon him and omitted no essential matter, and that he clearly put the nature and scope of the defence before the jury and their duty in case of reasonable doubt.

It must not be forgotten that the alibi set up was not verified by the oath of the accused. While it must not be mentioned to the jury that the accused has omitted to testify, it is patent to both Judge and jury that under those circumstances the alibi has a hollow sound. It is not that of the accused but of his friends. It is therefore proper for the trial Judge to direct the attention of the jury to the points on which alone this defence can be tested, such as the exact time, and how the witnesses fix it and account for their presence and observation. As to what is referred

to as a comment on the omission of the accused to testify, in that the learned trial Judge said that the Hungarian's evidence had not been contradicted, I am quite unable to see the point of view which justifies the criticism. The accused could not possibly contradict the Hungarian, for, on the case put forward by the defence, he was not there but within Rotenberg's store, and in no position to controvert what the Hungarian says he saw. Besides, the Hungarian's evidence was entirely consistent with and rather helpful to his alibi, for, if the accused was not there, then the Hungarian must have seen another man who was the real murderer. How could it be suggested that the accused either could or would have contradicted the Hungarian?

Objections to the charge, so ably urged before us by Mr. Hellmuth, were, with the exception of two, unsubstantial. Those two were, first the rejection of evidence of two doctors and Mr. Davidson to contradict or discredit the testimony of Creighton, called by the Crown, and, second, that where an alibi is the defence, it must be separately treated, and the jury instructed to deal with it first and before approaching the rest of the case, and that if, having so dealt with it, a doubt as to the identity or of the presence of the prisoner remains in their minds, they are bound to acquit.

As to the first, the rejection of evidence, this seems to be founded upon a complete misapplication of the way in which the competency of a witness can be attacked. The practice is quite clear that where a witness is put in the box whose competency counsel for the opposing side intends to contest, the trial Judge may hear evidence as to his mental condition, including illusions or matters indicating mental unsoundness. This was not the course adopted here, though counsel for the prisoner had full knowledge regarding Creighton when he appeared in the box, and had prepared to combat it by that of two doctors and a lay witness. Instead of the usual course of challenging his competency being taken, Creighton was cross-examined by counsel for the prisoner as a competent witness and left the box. Then counsel for the prisoner, stating that the confessions or conversations of the prisoner, as taken down by Creighton, were fabrications and their origin not truly stated, and that Creighton, owing to his suffering from delusions, was not competent to give evidence, proposed to call two medical men and Mr. Davidson to contradict Creighton's statements. Such a course is not, in my judgment, permissible.

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Evidence as to the competency of a witness must be taken on the *voir dire* or may be heard on occasion after he has been actually sworn; but the question must be tried out, and the evidence on both sides as to competency received, so that the Judge can say judicially whether the impeached witness's evidence is to be received or not. I know of no case, and I think none exists, except where it is sought to shew or suggest personal bias through relationship or affinity, where, after the test of cross-examination has proved ineffective, witnesses have been called to contradict the witness on what is essentially a collateral matter when viewed as a matter of evidence.

Upon the second objection it is important to note that it has its foundation in the case of *Rex v. Paris*, a New Brunswick case, reported fully in 49 N.B.R. 400, though no details are given of the character of the alibi set up. In that case Mr. Justice Grimmer said:—

“In my opinion, as I understand the law, the trial Judge should have directed the jury in the first instance that they must accept or reject the alleged alibi. In case they accept the same it of course follows the accused would be discharged, but if it was rejected, they would then proceed to the consideration of the evidence and form their conclusion as to the guilt or innocence of the prisoner.”

In this, which is purely obiter, as the judgment of the Court proceeded upon another ground, he professed to agree with Mr. Justice Barry.

But I do not find that Mr. Justice Barry puts it quite so strongly; he bases himself on some English decisions in which he thought instructions relative to reasonable doubt in cases of alibi were omitted. The decisions on which his view is based are *Rex v. Rufino* (1911), 7 Cr. App. R. 47, and *Rex v. Finch* (1916), 12 Cr. App. R. 77. In the former case Bankes, J., said: “The learned Judge expressed himself very forcibly, saying, ‘Here is a man who has set up an alibi which is no shadow of an alibi from any possible point of view.’ That was a question for the jury.” In the latter case, Avory, J., said: “There was a strong case of alibi made out by the defence, but the Assistant-Recorder in his summing-up did not tell the jury that they must be satisfied that this defence was unsound before they convicted the appellant. The jury should have been told that, if they should find that in one or more of the instances where the appellant was

alleged to have committed offences the defence had proved this to be impossible, there would be sufficient ground for their acquitting the appellant upon the whole indictment."

I do not think that these cases indicate or support the rule laid down by Mr. Justice Grimmer. They rather tend the other way, especially the remark of Avory, J., that the jury must be satisfied "that this defence was unsound," and that they should be told to acquit if the defence has proved the impossibility of the accused having committed the offence charged.

In one of the American cases cited, *State v. Taylor*, 118 Missouri 153, the proper instruction as to alibi and reasonable doubt is said to be that the defendant is entitled to an acquittal if there is reasonable doubt that he was present when the crime was committed, but it does not support the view that the alibi can or must be dealt with by the jury in the first instance and on its facts alone.

Some extracts from that case may be of interest:—

"In every criminal prosecution the State assumes to shew as an essential element in his guilt, the presence of the defendant at the commission of the crime. This being true, a simple plea of not guilty, without other further plea, puts the State to the proof of his presence. If the State fails to shew that the defendant was present when the crime was committed, when, without his presence, it is impossible for him to be guilty, the prosecution must fail" (p. 166). In speaking of the doubt which an alibi may raise in the minds of a jury, it is said (p. 167) that the prisoner is entitled to an acquittal in such a case, "and it is not material whether this doubt arises from the defect in the evidence of the State, or the evidence of the defendant in rebuttal." "Proof of an alibi is, therefore, as much a traverse of the crime charged as any other defence, and proof tending to establish it, though not clear, may, nevertheless, with the other facts of the case, raise doubt enough to produce an acquittal" (p. 167).

I think the statement of Mr. Justice Anglin in *Clark v. The King* (1921), 61 Can. S.C.R. 608, 623, gives the correct view of a defence of alibi. It is as follows:—

"The defence of insanity, which goes to negative an essential ingredient of the crime—criminal intent—just as does the defence of inevitable accident—and as the defence of an alibi goes to negative another essential element, the identity of the accused—is thus put on the same footing as other defences. Evidence in

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support of them which creates in the minds of the jury a doubt whether some essential element of the crime has been established—a doubt which on the whole evidence is not removed—entitles the accused to an acquittal, since the burden of satisfying the jury of his guilt beyond reasonable doubt, which always rests on the prosecutor and never changes, has not been discharged.”

It would, in the case at bar, be extremely difficult for a Judge to instruct a jury precisely in the terms of the *Paris* case or the *Missouri* case. If the defendant had not been close to the scene of the crime at or about the material time, as for example if the alibi was that he was then in Hamilton, it might be a reasonable, though I do not think it is a compulsory, course to instruct a jury to find first as to whether the alibi defence had raised a reasonable doubt in favour of the prisoner. If it had not been testified that, in addition to his having been near the place of the crime, he had owned a revolver which was found close by, and that he was seen, or was supposed to have been seen, in a grey coat, entering the place where Goldberg was shot, the alibi supported by the blue coat might have been successful. But that defence could not, and properly ought not to be dealt with, apart from the surrounding facts which went to prove his presence and the likelihood of his having been concerned in the death. I fail to see how the jury could properly disentangle from the evidence of the Rotenberg group, the facts which were given to prove or make likely the presence of the prisoner elsewhere that in the Rotenberg store. It must be remembered that in this alibi certain features in it are not very clear. Time is very important, for there might have been time for the prisoner to get to Rotenberg's place and to change his coat, Rotenberg having several blue coats like that of the prisoner; and, while the prisoner stated to the detective, soon after the deed was committed, that he had been at Rotenberg's place at the material time, there was a period from then till midnight, when the Rotenberg witnesses were taken down to the police station, for them to have learned what the prisoner had stated to the detective.

The charge of the learned trial Judge did not differ much from the statement of Mr. Justice Avory in the case cited. Jeffrey, J., said:—

“Then you have got the evidence given by the defence, which, if accepted by you, that is in its entirety, if you believe it, goes to establish an alibi which is offered by the defence in this case.

Scrutinise it carefully, analyse it in every way and apply the same tests as you would apply to the evidence of a Gentile; allow no feeling whatever in regard to it. *You will consider first the question of the alibi, and if you are satisfied in regard to the alibi,* then, gentlemen of the jury, that is the end of this case.

"The burden is always upon the Crown in cases of this kind, but if, after a further consideration of the case, you still have a reasonable doubt in your mind, then it is your duty as well as your obligation to give him the benefit of that doubt and find him not guilty."

I would dismiss the application and the appeal.

MIDDLETON, J.A.:—In my opinion this appeal entirely fails. I cannot find any error in the charge of the learned trial Judge of sufficient gravity to lead me to believe that any miscarriage of justice has taken place.

The salient features of the case are uncontroverted and unchallenged. A gun was found concealed in the vacant land adjacent to the room in which the murder took place. This gun was proved to be the property of the accused. The bullet which actually killed the man was found and it was demonstrated that it had been discharged from the gun in question. The gun had been freshly deposited where it was found, for it had not rusted. Two cartridges in the gun had been exploded. One chamber of the revolver was empty. It was proved that a cartridge similar to those used in this revolver had been found upon the floor of the room where the murder afterwards took place, at a time when the accused was present. He made, at that time, no explanation as to its possible origin, although the question was discussed. This cartridge was carelessly thrown into an adjacent piece of land, and, after the murder, was found.

These facts strongly point to the accused as the murderer, and go to shew premeditation in the commission of the crime. The finding in the premises of the accused, immediately after the murder, of overalls damp from apparently recent use, and stained with human blood, is very significant although not conclusive, for it is not shewn that the accused had ever worn them.

The statements made by the accused to convicts in the gaol cannot be disregarded, although the witnesses, as might be expected, are far from being highly respectable.

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All this and much more calls for explanation, and cannot be swept away by microscopic criticism of the charge of the learned trial Judge. The accused gave no evidence; and, while this cannot be commented upon to the jury, it is a factor which must be considered by the appellate court. His failure to testify does not prove his guilt, but when the Court is by the statute required to dismiss an appeal unless it is satisfied that there was a miscarriage of justice, the failure of the accused to explain in any way facts which place a very heavy onus upon him cannot be ignored.

It may be that the evidence is very largely circumstantial, but the actual facts are known to the accused, and he has the right, under the laws as they now exist, to explain them away by his own evidence. For example, he is not directly shewn to have been in possession of his gun at the time of the murder. He was in possession of it at an earlier date. It may have been a mere coincidence that the victim was shot by this gun, and that the accused was at the time of the murder only a few yards away. It is possible that the gun had been stolen from his residence by the murderer. If so, he could have testified to the fact, and the jury might have accepted his explanation. He might have been able to explain how the cartridge, which apparently fell from the revolver while he was in the room, came to be there. He may have a satisfactory explanation as to how blood-stained overalls came to be found in his room. He might be able to deny that he made the compromising statements to the gaol inmates, and the jury might readily have believed that the stories told were incredible; but, notwithstanding all the damning chain of evidence, he chooses to maintain silence.

No comment may be made upon this to the jury, but the law does not forbid jurors to use their intelligence and to consider the absence of denial or explanation.

It seems to me to be idle to discuss, as against the weight of the evidence, part of which only I have mentioned, slight defects in the testimony of Crown witnesses; for example, the estimate by the Hungarian as to the height of the man whom he saw at some distance, as compared with his own stature. This was before the jury, and, no doubt, considered by them, yet it was suggested that the failure of the Judge to emphasise more than he did this particular feature of the hearing is one of the grounds upon which a new trial should be directed. It would serve no good purpose

to follow through all the matters that appear to me to be trivial, and of no real moment, although discussed at great length during the course of the argument. I have considered them all with the utmost care and attention, but they fail to raise in my mind the least idea that there was a miscarriage of justice.

I desire once again to emphasise the limited power which we possess under the statute. This power is defined by sec. 1014 of the Code. Before we can allow the appeal we must be of opinion that one at least of three things is established:—

First, that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence. That this condition existed was not even argued for the appellant.

Secondly, that the judgment of the trial court should be set aside on the ground of a wrong decision on any question of law. Several questions of law were suggested upon which, it is charged, the learned trial Judge erred. I shall deal with these in a moment.

Thirdly, that on any ground there was a miscarriage of justice.

Unless we are prepared to make some one of these three findings, our duty is clear, for the Court “in any other case shall dismiss the appeal.”

But the statute goes further. We may dismiss the appeal, notwithstanding that we may be of the opinion that any one of these three grounds have been established, if we are “also of opinion that no substantial wrong or miscarriage of justice has actually occurred.” In this case it is not necessary, so far as I am concerned, to discuss the precise meaning of this provision, for I am of opinion that no one of the three essential grounds has been established.

The three legal questions argued were:—

First, in the course of the cross-examination of one of the convicts, he was asked with respect to matters entirely foreign to the issue, and made his answers. In defence it was sought to prove that these answers as to these collateral matters were untrue. It has long been decided that in both civil and criminal cases an answer given in cross-examination as to collateral matters cannot be contradicted.

The second legal question was this. Creighton, one of the convicts to whom compromising statements had been made, was examined without any objection, cross-examined at great length

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as to matters relevant and matters utterly irrelevant, no objection being taken to the witness's competency, although unquestionably his veracity was attacked. As part of the defence, it was sought to call medical men for the purpose of suggesting that this witness was suffering from some form of mental unsoundness, and that he was of the type of mentality prone to invent stories, and to adhere to his fabrications, possibly believing them to be true, and that he was, by reason of mental disorder, a witness upon whose statement no reliance could be placed. It is clear that this evidence could not be given in defence. This does not mean that the mental capacity of a witness cannot be determined, but it must be determined, if at all, upon the procedure known as the *voir dire*.

When a witness is called who is not regarded as competent for any reason, his capacity can be determined upon a summary trial of the issue as to his capacity by the trial Judge. Manifestly, the challenge as to competency should be made when the witness is called, and before he testifies, although there is a discretion in the Judge to allow a challenge to be made at a later stage, if it is shewn that the party challenging did not know the facts earlier, or for any other satisfactory reason.

As subsidiary to this, it was proposed to call a witness or witnesses to shew that the accused as to some collateral matter had made a false statement. Evidence of this kind cannot be given. The most that can be done is to call a witness, who has knowledge of the reputation of the witness in question in the neighbourhood in which he resides, to testify as to his reputation. No such evidence was tendered.

The third legal objection taken was that it was the duty of the Judge, when dealing with the alibi set up, to tell the jury that if they had any doubt upon the evidence relating to the alibi as to the presence of the accused, they should give the prisoner the benefit of the doubt.

Here the charge of the learned trial Judge is saturated from beginning to end with repeated statements that the weight and effect of evidence is for the jury, and for the jury alone, that the onus is always upon the Crown, and that the prisoner is always entitled to the benefit of any doubt that has been raised in their minds. Even if the dictum of the learned Judge referred to in judgments already given is correct, the requirement has in this case been met.

I do not think that what is contended for is the law. The onus is always on the Crown, and it must prove its case beyond reasonable doubt. Where murder is alleged to have been committed by the accused, it is, of course, essential that the Crown should prove that the accused was present at the time of the commission of the crime. It may be convenient to speak of alibi evidence as a defence. Strictly speaking, alibi is only one method of negating the Crown case, and I can see no warrant for the idea that it has to be dealt with in the charge in any such way as to make the reiteration of the statement that the accused is entitled to the benefit of the doubt either necessary or desirable.

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MULOCK, C.J.O. (dissenting):—The accused was tried before Jeffrey, J., for the murder of one Samuel Goldberg, was found guilty, and appeals from his conviction.

Samuel Goldberg, Abraham Steinberg, Abraham Goldberg, and Harry Goldberg were carrying on a monument business in partnership under the name of the Goldberg Brothers at premises situate at the south-east corner of Dundas and St. Patrick-streets, in the city of Toronto.

At about 6 o'clock on the evening of the 5th March, 1930, the premises were partially destroyed by fire, and when it was extinguished Samuel Goldberg was found there dead, sitting at a chair in front of his desk, his body hanging over the desk. The *post mortem* examination shewed that a bullet had entered his head above his left ear, passed through and out above the right ear, and had caused death. There was evidence that coal-oil had been applied to the body and that a portion of the upper part had been consumed by fire.

One CsuhaJ, an Hungarian, occupied a house situate on the south-west corner of Dundas and St. Patrick-streets, thus separated from the premises where the fire occurred by St. Patrick-street, and he swore that at about 5.30 o'clock on the evening of the fire he was sitting by the window in the front room of his house and saw a man wearing a long grey overcoat and a grey cap cross from the north side to the south side of Dundas-street to the monument shop, pull aside his overcoat, put his hand down along his side and make some movement with it and enter the shop, and that in less than an hour thereafter he noticed the fire. He said the man was taller than he. The height of the accused was 5 feet 3 inches. This witness was measured in court and

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found to be 5 feet 5 inches in height. On cross-examination he twice swore that so far as he remembered the man was taller than he.

On the following morning, at about 2.30 o'clock, Detective Storm arrested the accused and swore that he was then wearing a grey overcoat and a grey cap. Various witnesses for the Crown swore that the accused was wearing a grey overcoat on the evening in question, whilst some witnesses for the defence swore that on that occasion he was wearing a blue or dark blue overcoat. The only evidence tending to identify the accused with the man seen by Csuhaj was the colour of his overcoat and cap.

A Colt revolver was found in the back-yard of the monument premises and was identified as having belonged to the accused. The bullet which killed the deceased was found in the shop and there was evidence that it had been fired out of the revolver in question.

James Creighton, a witness for the Crown, testified that he had been a prisoner in the Don gaol on a charge of forgery, and there made the acquaintance of the accused, and that they met and conversed almost daily; that on one occasion the accused told him that he was downstairs (in the gaol) seeing his lawyer and he came upstairs and he said that things looked bad, that an expert from Montreal had identified the bullet. "He told me he was in partnership with some of his nephews or relations and that they were not getting on very well and that the deceased or the man who was murdered was trying to hoist him out of the concern; that on the day of the murder he came down to the store or the marble place, whatever it was, and he carried a gun with him for protection when he came down there; that evening he left the marble place, the hired man I believe went first and he followed, he walked around the block and came back in again and had an interview with his nephew. . . . They had an argument and the nephew said he would throw him out, so he took the gun out for protection and it went off accidentally. He said then that he lit a match to the building and he went out and went up to the store, and when he was in there a detective came in—pardon me, I want to correct myself—he went out of the marble place, took the gun and rolled it in some paper and threw it in the back of the place, wherever it was, that he then went up to the store, I believe, and when he was there a city detective came in." The defence sought to discredit this witness by shew-

ing that he was mentally abnormal and that he also was ready to fabricate false evidence in other cases.

Wentworth Budd, another inmate of the gaol, testified that he there became acquainted with the accused, that he had told him that he and the deceased had had two or three arguments previous to the murder, one particularly bad one; that he had been carrying a revolver unloaded until the day of the murder; that on the previous day they had had some words about business, and that the accused pulled out the unloaded revolver and pointed it at the deceased; that at about 5.30 on the evening of the murder Nathan Goldberg went out, leaving the accused and Goldberg in the office; that Steinberg then left the office, was absent about five minutes, and when he returned saw the body slumped over the desk, and that he rushed up and pulled the body up. "I do not know what explanation he made, that is as far as he got." He said that the matter was discussed three or four times; that he talked about business being bad, and that he had two or three quarrels with the deceased. On cross-examination, Budd admitted having been convicted several times in respect of fraudulent transactions.

For the defence four witnesses gave evidence in support of the defence of alibi, Max Rotenberg, his wife Frances Rotenberg, Isidore Shulman, and Samuel Goldstein.

Max Rotenberg swore that the accused was in the habit of going to his store at 175 Dundas-street west two or three times a week merely in order to pay social calls, and that on the evening in question he was there, arriving "around five o'clock," not later than ten minutes after, and that he remained there about two hours; that there were also present Mrs. Rotenberg, Mr. Shulman, and Samuel Greenstein; that Greenstein arrived at about five o'clock; that the accused arrived after Greenstein; that Greenstein bargained with Rotenberg for the purchase of some goods, and that the accused took part in the discussion; that Steinberg was wearing a blue coat, that without any doubt he recalled his wearing a blue overcoat; that he had often seen him wearing it and never saw him wearing a grey overcoat. He swore that Steinberg did not remove his overcoat during the time he was there; that it would take him seven or eight minutes to walk from the monument shop to Rotenberg's shop. This witness stated that he went upstairs whilst Steinberg was there, and it was from his wife that he learned how long he had remained. He swore that at about

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eight o'clock of the evening of the fire he saw Steinberg in the street near the monument workshop; that he got into his car and was dressed as above stated.

Isidore Shulman swore that he saw Steinberg at about a quarter past five at Rotenberg's store. He said that he left his store in York-street as the city clock was striking five and walked to Rotenberg's; that it would take from fifteen to seventeen minutes to walk; that he went part of the way by street-car, and arrived at Rotenberg's between 5.15 and 5.20 o'clock; that, on his arrival there, there were Mr. and Mrs. Rotenberg, Steinberg, and Greenstein, and that he remained there three or four minutes; that Steinberg was wearing a dark overcoat and a dark cap, and that he remained behind at Rotenberg's when the witness left. That, when there, Shulman swore that he had had a conversation with Steinberg, and on leaving shook hands with him. He swore that he had a special reason for remembering that he left his store at five o'clock for Rotenberg's, the reason being that that morning he had arranged over the telephone with Rotenberg to be at Rotenberg's about five o'clock or a little after; he was indebted to Rotenberg and was going to make a payment on account.

Mrs. Rotenberg swore that Steinberg arrived at the store about 5.05 and remained there continuously until nearly 7; that there were present Greenstein, Steinberg, and Shulman, Steinberg coming in after Greenstein and Shulman after Steinberg; that Steinberg was wearing a dark coat and she had never seen him wearing a grey coat. On cross-examination she was asked how she remembered the time of Steinberg's arrival and she said she remembered it because of the clock striking five.

Greenstein swore that he was at Rotenberg's at five o'clock that afternoon of the 5th March; that he was buying goods there, and remained there till about seven, and that the accused came in about ten or fifteen minutes after Greenstein. He could not remember exactly the minute of Steinberg's arrival, but he knew the time of his own arrival by the circumstance that when he was leaving his place in Chestnut-street for Rotenberg's the city-hall clock was then striking five o'clock.

In his charge to the jury, the learned trial Judge several times instructed them that the Crown must satisfy them beyond reasonable doubt as to the guilt of the accused, and that if from the evidence they entertained any reasonable doubt as to his guilt

their duty was to acquit. In reviewing the evidence he drew the attention of the jury in considerable detail to evidence which appeared to incriminate the accused. Referring to the evidence of CsuhaJ, the Hungarian, a witness for the Crown, he said his evidence "was that on the night in question at about 5.30 by the clock which was on his desk, as he was sitting facing the window, he saw approaching, as counsel for the Crown has pointed out to you, a man in a grey coat, and that this man went to the door of the place of business, and that while at the door—and you will pay attention to this—he halted or hesitated for a second, went through some motion, you understand, with his hand going down towards his side and towards the door, the door was opened and he went in.

"Now, gentlemen, there were four keys; each of the partners had a key to the place. Two of the keys have been produced in court here. One of the keys was taken off the accused—he carried a key as a partner—another key was found on the person of the dead man, Goldberg; the other keys belonged to the other two partners.

"It is said by the Crown that the man who entered that place had a key to the premises. What do you say in regard to that? Do you think, having regard to the evidence given by the young Hungarian, that that man who halted at the door and went through those motions took a key from his pocket, and that he was one of the four who had a key to the place, and that he entered the place in that way? It is for you to say.

"Would it be a violent conclusion to say that, having regard to the motions that he went through, he did put his hand in his pocket, that he did draw a key out, and that he entered the premises by using the key? It is for you to say."

With regard to this question thus put by the Judge to the jury, in my opinion there was no evidence to warrant the jury in drawing any such conclusion, and they should have been so instructed, but, on the contrary, they were in substance told that they might guess what the facts were. Suspicion founded purely on imagination is not evidence, and it may here be observed that, assuming that the man raised his hand to the door and opened it, such action would be consistent with the view that he did so in order to open an unlocked door, but this view was not suggested as a possible explanation.

He then reminded the jury that, according to the evidence of

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the other partners, while there was any person inside, the door was off the latch, that is unlocked, and he says:—

“Did the man who entered that building at the hour of 5.30 o’clock that afternoon use a key? Then, bearing in mind that there were only four keys, so far as known and disclosed in the evidence, was he one of the partners of the concern?

“One partner was inside and murdered. Steinberg, the accused, is here in the dock. One of the other partners was in Hamilton at the time, and the other partner you heard, the old man in the witness-box a few days ago. He had not been at the place of business during the week, for the simple reason that he was preparing for a daughter’s wedding. She was to be married at the end of the week. Now, make up your mind in regard to that.”

Then again, referring to the evidence of the Hungarian, he reminds the jury that “he says that the man who entered that building had a grey coat on; he is positive in regard to that. That is a statement from a Crown witness, that he had a grey coat on. There is no contradiction of that, that the man who entered the shop at that time and who is supposed to have committed the deed had a grey coat on.”

Referring to the evidence of Dr. Crawford, the Chief Coroner, who was at the shop a short time after the fire, the learned trial Judge reminds the jury that Dr. Crawford there saw the accused and swore that he was wearing a grey coat and a grey cap, and he says, “Ask yourselves what reason Crawford would have for saying it if he did not believe it.”

Then the learned Judge refers to the evidence of Detective Levitt, who had sworn that on the night in question the accused was wearing a grey coat, and he asks, “Was he actuated by any improper motive when he said that the accused on the night in question was wearing a grey coat?” And, following up the matter of the grey coat, the learned Judge says: “Now with regard to the evidence of these two detectives (Levitt and another) do you think . . . that they would perjure themselves . . . and say something that was not true? . . . What do you say in regard to Crawford? . . . What motive would he have in saying that this man had a grey coat on? . . . Was he mistaken? . . . Was he dishonest . . . or was he honest when he swore in the witness-box that the accused that night had a grey coat on?”

Then the learned Judge proceeds: "There are three witnesses who swear positively as to the accused having a grey coat on that night, and you have the evidence of the Hungarian, who says that the man who went into the building that night wore a grey coat. . . . Then again you have the evidence of the mother of the deceased, who stated that she knew the accused had a grey coat and cap."

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Dealing with the evidence in support of the alibi, the learned trial Judge says: "Now, what as to the alibi given? What do you say as to Shulman? Shulman says he left his place of business as the clock was striking five o'clock. Do you think he is satisfied in regard to the time at five o'clock? Ask yourselves. Does he remember it was five o'clock? . . . He says it would take him a matter of ten or fifteen minutes to go to Rotenberg's store, and he was there for a few moments and left; and while he was there he says he shook hands with the accused. Do you believe his story?"

"You will remember that three or four of the witnesses called for the defence with regard to the alibi all fixed their time by the striking of a clock. Is that strange or is it just a coincidence? Do you believe that they honestly believe what they stated in the witness-box, that the clock was striking and that they fixed the time by the clock? It is for you to say in regard to it. Are they sure in regard to the night? Could there be any mistake there, although there is no evidence at all as to any other night? It is for you to say with regard to it. But there is this coincidence about it, that those witnesses swore as to the fixing of the hour by the striking of the clock. Is it too pat, or are they honest? Did they honestly hear the clock strike? Are they honestly saying that they fix the time by that, and that so far as they are concerned the accused was with them or in or about that shop at that time?"

"You have the evidence of the merchant who was there shopping. You have got the evidence of the others who were there doing business, and if you can accept their story, making allowances in regard to time, then very shortly after five o'clock—they vary in regard to the time—the accused was in their store and was there until about seven o'clock.

"Again I point out to you that a few moments—because Rotenberg's store was only a short distance from the monument

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works—a mistake of 10, 15, or 20 minutes or so in time might make a great deal of difference.

“Of course, you have got to bear in mind the evidence adduced here by the Crown, that at 5.30—and he, the Hungarian, fixed it by a clock, not by the striking of a clock, but a clock he had on his desk—that he saw this man who is supposed to have committed this crime enter the shop.

“Now, gentlemen, I cannot help you very much in regard to the alibi. You have got to make up your mind as to that; but there is this one significant fact about it which I want you very thoroughly to consider in regard to it; not only are these people satisfied in regard to their time, but they swear that this man wore a blue coat. Do you believe that? It is for you to say. Do you believe that not only did they observe the time accurately and carefully and can swear positively to it, but they also observed this man so carefully as to know how he was dressed, as to swear that he wore a blue coat?

“Gentlemen, if he wore a blue coat in that store, as sworn to by these witnesses, then you have a right to say that Crawford and the rest of these people are not telling the truth. Do you believe that he did? It is for you to say. Crawford swears that he wore a grey coat when he saw him. Others swear that he wore a grey coat. These people all have observed, and they swear that on that night he wore a blue coat. Do you accept that evidence as true? Do you think they did observe him and could tell that he did wear a blue coat and that he was not wearing a grey coat? It is for you to say.

“I cannot help you very much as to the alibi. You have heard these people in the witness-box and you saw the manner in which they gave their evidence. You will form your own conclusion as to whether they are telling the truth or not in regard to it or whether they are mistaken. Look at it. You will take the whole evidence and make up your mind in regard to it.

“If Rotenberg told the same story to the police, and he says he did, as to the man being in his shop, did he tell him that this man was wearing a blue coat? If Steinberg was wearing a blue coat that night, as Rotenberg says, the police were still hunting for a grey coat. Did he tell them what? He says he told them the story, the same story as he told in the witness-box in regard to it.”

Mr. Hellmuth contended (*a*) that with respect to the defence

of alibi it was the duty of the learned trial Judge to instruct the jury that they should not convict unless they specifically rejected that evidence, and that he had failed so to instruct them, and (b) that the learned trial Judge should have directed the attention of the jury to certain of the evidence in support of the alibi defence, which he failed to do, and that for these two reasons the conviction should be quashed.

In *Rex v. Finch*, 12 Cr. App. R. 77, Avory, J., says: "Non-direction may in some cases amount to misdirection. Whether it does in any particular case depends upon the facts of that case." And he quotes from the judgment of Alverstone, L.C.J., in *Rex v. Stoddart* (1909), 2 Cr. App. R. 217, 246: "Every summing-up must be regarded in the light of the conduct of the trial and the questions that have been raised by the counsel for the prosecution and for the defence respectively;" and he thus refers to one of the defences, namely, that of alibi: "The first question the jury had to consider was whether the appellant had been satisfactorily identified by the witnesses for the prosecution who professed to do so. It is clear that on this matter observations should have been made to the jury by the Assistant-Recorder, which were not made . . . There was a strong case of alibi made out by the defence, but the Assistant-Recorder in his summing-up did not tell the jury that they must be satisfied that this defence was unsound before they convicted the appellant . . . The Court is of opinion that the jury were entitled to have the assistance of the presiding Judge in directing them . . . In these circumstances a miscarriage of justice may well have occurred . . . and the appeal must be allowed, and the conviction quashed."

In the case of *Rex v. Paris*, 38 Can. Crim. Cas. 126, a decision of the Appellate Division of the Supreme Court of New Brunswick, the defence was alibi; the majority of the Court holding that it was the duty of the trial Judge to instruct the jury specifically as to the evidence in support of the alibi and also that he could not convict unless they rejected that defence, and that that duty was not performed merely by a general instruction proper in itself upon the question of reasonable doubt. This case was cited with approval in *Demers v. The King*, 46 Can. Crim. Cas. 394.

In the case of *State v. Harvey*, 32 S.W. Repr. 1110, where the defence was that of alibi, the opinion of the Court is expressed in

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the head-note, which reads as follows: "In a criminal case where the defence was an alibi, the State must shew the presence of the accused at the time and place of the alleged commission of the crime, and that if the jury believes the defendant's evidence sufficient to raise a reasonable doubt, or the State's evidence is so defective as to raise a reasonable doubt, they should acquit."

In *Clark v. The King*, 35 Can. Crim. Cas. 261, at p. 272, Anglin, J., referring to the defences of insanity, inevitable accident, and alibi, says: "Evidence in support of them which creates in the minds of the jury a doubt whether some essential element of the crime has been established—a doubt which on the whole evidence is not removed—entitles the accused to an acquittal, since the burden of satisfying the jury of his guilt beyond reasonable doubt, which always rests on the prosecutor and never changes, has not been discharged."\*

In an issue where an alibi is the defence, in substance the prosecution alleges that a certain offence requiring the actual presence of the accused was committed by the accused at a certain time and place, and the accused alleges that he was not present when and where the offence was committed, the affirmative of this issue is on the prosecution, as it is where the defence is "not guilty," and the onus is on the prosecution to prove his presence. Did the learned trial Judge make this clear to the jury? He said: "Then you have the evidence given by the defence, which, if accepted by you, that is in its entirety, if you believe it goes to establish an alibi which is offered by the defence in this case . . . you will consider first the question of the alibi, and if you are satisfied in regard to the alibi then, gentlemen of the jury, that is the end of the case." I think the learned Judge erred in so instructing the jury. The onus was not on the accused to satisfy the jury that he was not present, but on the Crown to prove that he was present. I am of opinion that he should have instructed the jury that, if the Crown had not satisfied them beyond reasonable doubt that the accused was present, their duty was to acquit: *Rex v. Myrshall*, 8 Can. Crim. Cas. 474.

Did the learned trial Judge correct this error by his further instructions that "the burden is always upon the Crown in cases of this kind, but if after a further consideration of the case you still have a reasonable doubt in your mind, then it is your duty

\* The same passage is quoted by HODGINS, J.A., *supra*, from the report in 61 Can. S.C.R. at p. 623.

to give him the benefit of that doubt and find him not guilty? If, after full and honest consideration of this evidence, you have an abiding conviction in your mind that the accused man, as alleged here, was the owner of the revolver, and that he on the night in question shot and killed Samuel Goldberg, do not shirk your duty, do not get rid of your responsibilities, no matter what it carries in its wake, do your duty and find him guilty." These latter observations do not, I think, qualify the previous instructions respecting the alibi issue, nor would they, I think, be so construed by the jury; they appear to have reference simply to the whole case. With respect to the alibi issue the jury were entitled to specific instructions to the effect above set forth, and, such instructions not having been given them, the conviction, I think, should be quashed and a new trial had.

Another question is whether the learned trial Judge fairly summed up the evidence. A trial Judge is not bound to refer to the whole evidence, but in dealing with the evidence it is sufficient in summing up if he puts the case to the jury in a way to insure their due appreciation of the value of the evidence and if he adequately instructs them as to the law: *Rex v. Crippen* (1910), 5 Cr. App. R. 255; *Rex v. Bundy* (1910), 5 Cr. App. R. 270.

Where the case is one of identification of the accused, and the evidence is weak, the attention of the jury should be called to its infirmities. *Rex v. Phillips* (1924), 18 Cr. App. R. 151, was a case of warehouse breaking, and the whole case for the prosecution rested upon the evidence of one witness, a stranger to the accused, who had a momentary view of him as he ran away, and he purported to identify him. The circumstances of the identification were not drawn to the attention of the jury by the trial Judge in summing up, and the conviction was quashed, the Lord Chief Justice saying: "The evidence of identification in this case was weak. It is not, of course, to be said that a person is not to be convicted on the testimony of one witness identifying him, but where the circumstances are those of the present case—where the identifying witness is a stranger to the defendant and the physical circumstances are those to which reference had been made—it is right that the attention of the jury should be directed to the weakness of the evidence. If, after such a direction, the jury think it right to convict, that is one thing; it is another

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thing where, as here, there is no reference in the summing-up to the fact that there is only one witness to identify."

Further, I am of opinion that, where the identity of the accused is a material defence, the jury should be instructed to weigh the evidence with great care: *Rex v. Chadwick* (1917), 12 Cr. App. R. 247; *Rex v. Murphy* (1921), 15 Cr. App. R. 181. In his summing-up, it is the duty of the trial Judge to analyse and present to the jury the evidence in favour of the accused as fully and carefully as that for the Crown, and in such a way as to make it reasonably certain that the jury understands and appreciates its meaning and effect, failing which there may have been a miscarriage of justice; in such a case the conviction should be set aside: *Rex v. Baugh* (1917), 38 O.L.R. 559, 564; *Rex v. West* (1925), 57 O.L.R. 446.

Dealing with the evidence for the Crown, the learned trial Judge in considerable detail directed the attention of the jury to the evidence of Csuhaj, the Hungarian. That evidence conflicted with that of the witnesses for the defence in support of the alibi. I am of opinion that the learned trial Judge should have pointed out to the jury some of the infirmities that might fairly be imputed to the Hungarian's evidence. He first swore that he saw the "man" on the north side of Dundas-street, but on cross-examination he said the first time he saw him was when he was on the sidewalk on the south side within two or three yards of the shop. One or other of these statements is incorrect. He testified to the colour of the "man's" coat and cap. Why was he unable to identify the "man?" The hour was 5.30 of the evening of the 5th March. If the visibility enabled him to determine correctly the colour of the coat and cap, it should have enabled him to determine, to some extent at least, the man's facial appearance: for example, was he or was he not clean-shaven? If he saw him on the north side of the street, he would have had almost a full-face view of him, but he gave no personal description of him, made no attempt to describe his facial appearance, whether he was a young or old man. In fact he did not identify the man but simply the colour of his coat and cap. Further, he said that the man was taller than he, whilst in fact he is shorter. These circumstances, called to the attention of the jury, might have caused them to attach less weight to the Hungarian's evidence and correspondingly more to that of the alibi witnesses. These

infirmities in the Hungarian's evidence should, I think, have been pointed out to the jury.

Further, on the night of the fire, in answer to questions put by detective Storm, the accused stated that he had left the shop at five o'clock; that he went from there direct to Rotenberg's; that he reached the Rotenberg shop at about 5.30; that he walked there from the plant; that he stayed at Rotenberg's until nearly seven o'clock; and that neither Nathan Goldberg nor Sam Goldberg was in the shop when he left.

Dr. Crawford, the Chief Coroner, also testified to a conversation with Steinberg. He swore that a few minutes after 7 o'clock of the evening in question, he arrived at the shop, entered the office where the body was lying, and that a few minutes later the accused arrived, when Crawford asked him if he knew the dead man, and the accused said it was Goldberg, his partner. Crawford then asked him at what time he had last seen Goldberg alive, and he said, when he left the place in the neighbourhood of 5.30. Crawford asked him if there was any one there at the time, and he said something about a nephew of Goldberg having been there.

Crawford further stated that Steinberg told him that Goldberg's nephews were there when he left, but he thought that statement was not in answer to a question.

The statements of the accused in answer to questions put to him by detective Storm and Coroner Crawford were not volunteered but were elicited by questions from those two officials, and I think they ought to have been brought to the attention of the jury, not as evidence of the truth of the statements but as consistent with his defence: *Rex v. Kirkham* (1909), 2 Cr. App. R. 253.

Further, in the following respects I think the summing-up was hardly fair to the accused. Referring to the evidence of the Hungarian, the learned trial Judge reminded the jury that he fixed the time when he saw the man at 5.30 by his clock on the desk, but as to Shulman's evidence that he fixed the time when he left his place of business by the city-hall clock, and he asks: "Do you think he is satisfied in regard to the time of five o'clock? Ask yourselves. Does he remember it was five o'clock? Is he satisfied it was five o'clock? He says it would take ten or fifteen minutes to go to Rotenberg's store, and while there he shook hands with the accused. Do you believe his story?" Then as to the other witnesses for the defence, who fix the time by the strik-

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ing of a clock, he asks: "Is that strange or is it a mere coincidence? Do you believe that they honestly believe what they stated in the box, that the clock was striking and that they fixed the time by the clock? Did they honestly hear the clock strike? Are they honestly saying that they fixed the time by that?" And he reminds the jury that the Hungarian fixed the time not by the striking of a clock but by a clock on his desk. The means whereby the Hungarian fixed the time was in my opinion as open to doubting observations as was that of the witnesses for the defence and should have been treated in like manner.

As to whether the accused was wearing a grey coat or a blue coat the learned Judge cast no doubt on the testimony of the Crown's witnesses that it was a grey coat, but as to the testimony of the witnesses for the defence who said it was a blue coat, he says: "They swear that this man wore a blue coat. Do you believe that? Do you believe that they observed this man so carefully as to how he was dressed as to swear that he wore a blue coat?" Then he tells the jury that, if the accused wore a blue coat in the store, "then you have a right to say that Crawford and the rest of these people are not telling the truth. Do you believe that he did?" Crawford swears that he wore a grey coat when he saw him, others swear that he wore a grey coat. Was he dishonest? These people all have observed and they swear that on that night he wore a blue coat. Do you accept that evidence as true?" The evidence of the Crown witnesses that the accused was wearing a grey coat was as open to question as was that of the defence witnesses and should have received the same treatment. The tenor of the learned trial Judge's questions respecting the defence witnesses was to cast doubt upon the correctness of their evidence, whilst in the case of the Crown witnesses it suggested acceptance of their evidence.

The fact that each of the four partners had a key to the shop was, in my opinion, presented to the jury in a manner unfair to the accused and may have seriously prejudiced his defence. First, the jury were reminded that the Crown says that "the man who entered that shop had a key to the premises." Then he says: "Each of the partners had a key to the place, one was taken off the accused, another was found on the dead man, one of the partners was in Hamilton, and the other partner had not been down at the place of business for a week." The suggestion is that the possession of a key by the accused tended to identify him as the man

whom the Hungarian says he saw enter the shop. There is not a scintilla of evidence that that man had a key. The Hungarian did not see it nor did he see the man put his hand in his pocket, but because he dropped his hand by his side, and thereafter went through some motions with it at the door and entered the shop, it is suggested that he took a key from his pocket and with it unlocked the door. The deceased was then in his shop, and the practice was to leave the door unlocked whilst any one was inside. What then the need of a key? For all that appears, there may have been more keys to the shop, but without accounting for two of the four, and on the assumption, unsupported by any reliable evidence, that the man had the only available, suitable key, the jury were in effect asked to assume that he was the man whom the Hungarian saw. I am of opinion that the key incident has no evidential value, and the jury should have been so told.

Referring to the evidence of the Hungarian, the learned trial Judge told the jury as follows: "He says further, gentlemen, that the man who entered that building had a grey coat on; he is positive in regard to that. That is a statement from a Crown witness that he had a grey coat on. There is no contradiction of that: that the man who entered the shop at that time and who is supposed to have committed the deed had a grey coat on." From whom was the contradiction to come? The Hungarian was the only person who saw the man enter the shop. The Crown's contention is that that man was the accused. If so, then he was the only person who could contradict the Hungarian, and the learned trial Judge's statement as to the absence of contradiction may have been reasonably interpreted by the jury as meaning that the accused had not gone into the box and contradicted the Hungarian. If, as I think it was, open to such an interpretation, then the statement of the learned trial Judge is open to the objection that it was in contravention of sec. 5 of the Canada Evidence Act, which declares that the failure of a person charged to testify shall not be made the subject of comment by the Judge.

For the reasons above mentioned, I am of opinion that the summing-up was not fair to the accused and may have caused a miscarriage of justice, and therefore the conviction should be quashed and a new trial directed.

GRANT, J.A. (also dissenting):—On this appeal, with great

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respect for the opinions of those who think otherwise, I agree with my Lord, for the reasons which he gives, that there should be a new trial in this case. I desire to express my views in regard to certain other questions of some importance raised by counsel upon the appeal, and not dealt with by the Chief Justice.

One of the prominent features of the argument put forward in appeal by the counsel for the accused, and vigorously pressed upon us, was that the learned trial Judge erred in refusing to admit certain evidence tendered on the accused's behalf. At the trial, and after the witness Creighton, who testified to an alleged admission made by the accused to him when they were both confined in gaol, had been sworn, examined in chief and exhaustively cross-examined; and when the evidence for the defence was being put in, counsel desired to put in evidence to contradict Creighton's testimony given upon cross-examination and relating to irrelevant matter, with a view to the breaking down of his credibility. It was urged, in support of the unusual course sought to be adopted, that such evidence thus sought to be adduced would shew or tend to shew that Creighton had in another case manufactured evidence, or that he was a manufacturer of evidence. The reason thus stated gave some colour to the contention that the circumstances were unusual and of a special character, and it was urged quite vigorously that therefore the evidence ought to be admitted at that stage of the proceedings.

When carefully considered and analysed, what was attempted will be found to have been nothing more or other than an effort to attack the credit of the witness by giving evidence in defence touching upon entirely irrelevant matter, having nothing whatever to do with the issue before the jury, by shewing that on another occasion, in another issue, and under other conditions, the witness had tried to manufacture evidence; and this was to be shewn by the testimony of one or more witnesses, who, it was stated, would contradict the statements made by Creighton upon his cross-examination in respect thereof.

The putting in of such evidence as above outlined was quite properly rejected by the trial Judge. The rule in regard to such attacks upon credit is quite definite and clear in its terms. If the evidence of the witness sought to be attacked bears directly upon and is relevant to the issue before the Court, then the attack may be made by evidence contradicting the statement of the witness,

for the simple reason that such evidence is relevant to the issue. But, if the statements of the witness have to do with matter which is purely collateral and irrelevant to the issue, the witness may be cross-examined in regard thereto, but his answers must be accepted, in the sense that they cannot be contradicted by the testimony of other witnesses or evidence *aliunde*. Such evidence would be entirely irrelevant to the issue before the Court.

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If it is desired to attack the credit of the witness upon the ground that he is not to be believed upon oath, the rule is equally clear and definite, and of long standing. Such evidence is generally spoken of as bearing upon and directed to the witness's general reputation for veracity in the locality where he is known. A witness called for that purpose must be one who has lived in or about the neighbourhood in which the impeached witness has resided or carried on business, and as a general rule such evidence has not been permitted to be given by a witness who merely went to the neighbourhood for the purpose of informing himself as to such reputation. The foundation having been laid, the question to be asked should take some such form as "From your knowledge of the general reputation of (the witness) for veracity, would you believe him on oath?" Apparently from the statements of text-writers, in England the question has, in practice, been shortened to "From your knowledge of (the witness) would you believe him on oath?" But there has not been any change in the rule that the belief or disbelief of the witness upon oath must be based upon knowledge of his general reputation. In other words, the statement of one who had no knowledge of the general reputation of the impeached witness would not be admissible.

A summary of the above, with reference to certain of the decided cases, may be found in the 7th (1930) edition of Phipson on Evidence, at the foot of p. 465 and top of p. 466.

What has been stated above applies more particularly to evidence sought to be put in by the witnesses Davidson and Cookman.

Counsel for the accused also sought to put in at the trial the testimony of doctors directed to the evidence of the witness Creighton above mentioned. When the question of the admissibility of testimony was first raised, what was proposed, apparently, was to attack the credibility of the witness. After some discussion between the learned trial Judge and counsel for the defence, the former, suggesting an extreme and hypothetical case,

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remarked that, suppose "it then became known to the defence that the man was not of sound mind." This was taken up by counsel for the accused, and it was urged (foot of p. 461) that, "if Creighton was suffering from an aberration of intellect which obliged him to go and make these false statements, then I submit that it would be a travesty upon the administration of justice if it was impossible for the defence to meet such a case. Your Lordship put it 'insane.' If a man, which could be absolutely demonstrated, was without mind, and had gone into the witness-box and had told of an alleged confession; if a man who is always imagining things, who was drawing upon his imagination and who was not in that sense sane; was not normal. If it is impossible it is impossible; but I submit our system of jurisprudence"—

Subsequently (on p. 463) counsel for the accused stated:—

"There may be after this a calling of a doctor, a medical man who has attended this man. That may be. I cannot say whether that is necessary or not. If this evidence would not be admitted, I take it that the other evidence would not, because it could not be put on any different ground; because if I cannot give this evidence" (referring to Davidson *et al.*) "I could not put a doctor in the box to say that this man is *non compos*."

It would appear from the above, and also from the argument upon this point, as presented to us on appeal, that it was sought, or would be sought, by the evidence of one or more doctors, to shew that the witness Creighton was mentally unsound, and that therefore his evidence should not be accepted. A good deal of stress was laid by counsel upon the great injustice which would be done if an attack could not be made upon the mental capacity of a witness with a view to shewing that his evidence ought not to be accepted. It should be noted here that no attack or objection of any kind was made to the competency of the witness Creighton, when he was called and sworn and examined on behalf of the Crown, or when he was cross-examined on behalf of the accused, except that in the course of the cross-examination he was asked as to his having been in some hospital or similar institution in one of the Western Provinces. In answer to that question he stated that he had been in a hospital in Manitoba for "an operation for appendicitis and for nervous trouble" (p. 317). He denied that he was in an asylum or in a psychiatric hospital (*idem*).

As the point involved does not appear to have been dealt with in any decided case in our Courts, in so far as was disclosed upon the argument before us, and as it appears to be of some importance, I desire to add a few words with regard to it.

It is well settled that the question of the competency of a witness is to be determined by the Judge alone, and not by the jury. Once the Judge decides that the witness is competent, the weight to be attached and the credit to be given to his testimony are for the jury. Competency goes to the admissibility of the evidence of the witness. Objection to competency should therefore be taken when the witness is called. If the trial Judge be satisfied that the witness is so mentally deficient as to be utterly incapable of appreciating the sanction of an oath, and of understanding questions put to him, and of giving reasonable and intelligible answers thereto, his evidence would be altogether inadmissible. If, however, he is a monomaniac he may be quite competent to give evidence upon any or all matters with respect to which his mentality is not unsound. So also, even though insane or mentally defective on all questions on some occasions, he may have lucid intervals, during which he would be a competent witness and his testimony should be admitted. As a general rule, on objection on any such ground to the competency of a proposed witness should be taken before the witness is sworn, or at any rate before he gives any testimony. This apparently is not a hard and fast rule, as in one case, where it appeared to the trial Judge, during the course of the giving of the testimony, that the witness was not competent, the trial Judge stopped the examination of the witness and ordered the testimony which he had given to be stricken out of the record, and also instructed the jury that such testimony should be entirely disregarded: *Regina v. Whitehead*, L.R. 1 C.C.R. 33.

"If a witness be objected to on the ground of unripeness or imbecility of mind—in all these and the like cases the preliminary question of admissibility must, in the first instance, be exclusively decided by the Judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses, in order to arrive at a just conclusion:" Taylor on Evidence, 11th ed., vol. 1, foot of p. 26 and top of p. 27.

"A lunatic under confinement in a lunatic asylum is admissible as a witness, if the Judge considers him competent in point

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of understanding, and to be aware of the nature and sanction of an oath. The lunatic may be examined and cross-examined, and witnesses called on either side in order to determine the question of competency; but when admitted it is for the jury to determine whether his testimony is affected by his insanity, and what degree of weight is to be attached to it" (head-note to *Regina v. Hill* (1851), 2 Den. C.C. 254). This was the decision of a court of five Judges headed by Lord Campbell, C.J. One Donnelly was to be called as a witness for the prosecution, and before he was called the question was raised as to his competency, as he was a lunatic patient in an asylum at Camberwell. Coleridge, J., assisted by Cresswell, J., was presiding in the trial court. When the objection was raised to the competency of the witness, other witnesses were called to give evidence in regard thereto, who spoke of the delusions under which he laboured. Of these witnesses, two were doctors of medicine and others were attendants in the asylum. Thereafter the proposed witness Donnelly was called and was examined on the *voir dire*. The Judges presiding at the trial decided that the witness was competent and admitted his testimony. The whole matter was very fully argued on appeal, the observations of members of the Court during the course of the argument being noted. The Court held unanimously that the right course had been adopted. This case has been cited and followed as settling the law; for example in a civil suit of *Spittle v. Walton* (1871), L.R. 11 Eq. 420, at pp. 421, 424.

A brief review of the cases and their effect will be found in the 27th edition of Archbold's Criminal Pleading, Evidence, and Practice, at p. 461. In one case it was held that after the witness has been sworn and examined the opposite party cannot adduce other evidence to shew his incompetency (*Dewdney v. Palmer* (1839), 4 M. & W. 664). That, however, was a civil case, and, as has already been mentioned, in the *Whitehead* criminal case the trial Judge, at a later stage in the proceedings, stopped the examination of the witness and ordered that the testimony which had already been given should be stricken out and that it should be disregarded by the jury. This course would doubtless be followed in any case where the incompetency became manifest while the witness was being examined.

In the case at bar, as has already been mentioned, no objection to the competency of Creighton was taken either before he was

sworn or examined or even after he had given his testimony and during the putting in of the Crown's case, although the defence counsel were apparently as fully informed beforehand as they were at any later stage. It was not until the defence was being put in that any attempt was made to attack his competency, and the attack then made was rather against his credibility. Upon the argument before us, counsel for the accused endeavoured to avail himself of any foundation which there might be for treating it as an attack on competency. It seems to me quite clear, under the authorities already cited, that such an attack cannot be made at so late a stage unless the trial Judge should see fit to act as he did in the *Whitehead* case (*supra*). If it is seriously intended upon the trial to object to the competency of any witness upon the ground of mental incapacity, the objection ought to be made before the testimony is given, and the trial Judge should then satisfy himself as to the competency of the witness, or the reverse, either by examination on the *voir dire*, or by evidence *aliunde*, or both. If the trial Judge then considers the witness to be competent, the weight and credibility will fall to be determined by the jury.

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*Appeal dismissed (MULOCK, C.J.O., and GRANT, J.A., dissenting).*

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[IN CHAMBERS.]

RE CASSIDY.

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April 9.

*Land Titles Act—Trust Corporation—Application by, for Registration as Owner of Charge—Description as "Executor"—R.S.O. 1927, ch. 158, sec. 95(1), (2)—Notice of Trust.*

A trust corporation claimed the right to be registered, under the Land Titles Act, R.S.O. 1927, ch. 158, as owner of a charge, and to be described, not as a trustee, but as executor of C., deceased:—  
*Held*, having regard to the provisions of sec. 95(2) of the Act, that the description of the applicant as executor of C. was not notice of any trust, express, implied, or constructive, and the entry thereof upon the register would not contravene sec. 95(1) of the Act.  
 For the purposes of sec. 95(1), "executor" is but another way of describing a trustee.

An appeal by the Capital Trust Corporation Ltd. under sec. 142 of the Land Titles Act, R.S.O. 1927, ch. 158, from the refusal

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of the Local Master of Titles at Ottawa to register the corporation, in its capacity of executor of the will of Patrick H. Cassidy, as owner of a charge upon a parcel of land in Ottawa.

The reasons of the Local Master (MR. F. A. MAGEE, K.C.) for his refusal were as follows:—

Under sec. 95(1), there shall not be entered on the register or be receivable any notice of any trust, express, implied, or constructive. This subsection appears first in the original Ontario Act of 1885, 48 Vict. ch. 22, sec. 85(1), that Act being almost a transcript of the English Land Transfer Act, 1875, 38 & 39 Vict. ch. 87.

It was found impracticable to avoid references to trusts on all occasions, so that in R.S.O. 1887, ch. 116, sec. 85, what is now subsec. 2 appears. By it, describing the owner of any charge as a trustee, whether the beneficiary or object of the trust is or is not mentioned, shall not be deemed notice of a trust within the meaning of this section. The corresponding section (74) in the English Land Registration Act, 1895, 15 Geo. V. ch. 21, reads as follows:—

“Subject to the provisions of this Act as to settled land, neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express implied or constructive, and references to trusts shall, so far as possible, be excluded from the register.”

So, too, under the Ontario Companies Act, R.S.O. 1927, ch. 218, sec. 74(1), “A company shall not be bound to see to the execution of any trust, whether express, implied or constructive to which any share is subject.”

The Capital Trust Corporation Ltd. claims the right to be registered as owner of a charge, and to be described, not as a trustee, but as executor of the last will of Patrick H. Cassidy, late of Hurdman's Bridge, in the county of Carleton, Esquire, deceased. I see no objection to its registration as trustee (whether the beneficiary or object of the trust is or is not mentioned, e.g., trustee of Patrick H. Cassidy); but, as I think the Act means exactly what it says, the applicant, in my opinion, has no right to be registered as executor of the will of Patrick H. Cassidy or as executor of Patrick H. Cassidy (to use the shorter and better expression that is now coming into use), even though, by sec. 2 of the Devolution

of Estates Act, the real and personal property of the testator is held by the executor as trustee. Moreover, I cannot understand why the corporation insists on using the word "executor." Generally speaking, where an executor, after he has paid the testator's debts and the legacies, continues to hold the estate on behalf of the beneficiaries, the character of executor in which he held becomes merged in that of trustee, so that, strictly speaking, "trustee" is the correct term rather than "executor;" and, moreover, it happens to be the term expressly allowed by the Land Titles Act. Of course, on the death of an owner of a charge, the executor or administrator of such deceased owner may under sec. 57 be registered expressly as executor or administrator of the deceased, as owner of the charge in his place, and under sec. 59 such a person holds the charge upon the trusts and for the purposes to which the same is applicable. That, however, is not the case that I have to deal with. The case that I have is that of a person having money belonging to the estate who invests it on the security of a charge of land under his powers given by the will. In order that any person dealing with such an owner of a charge may not be bound to make inquiry as to the powers of the owner, such owner shall be described as trustee, and apparently not otherwise. There is no reason for such a distinction except that the Act expressly declares that such description shall not be deemed notice of a trust.

The Legislature excluded from the register all modifications which might qualify the absolute title, and therefore determined not to allow trusts to affect the transfer of land or charges.

The practice in this office, and I understand in the office at Toronto, which are the two principal offices outside of those in the northern districts, is not to allow the use of the word "executor" or of the words "in trust." If this interpretation is too narrow, then I think it can only be changed by an amendment to the Act or by a decision of the Court. Apart from the statute, under the general law the words "in trust," "trustee," and "executor" give notice of a trust which puts the purchaser on inquiry as to the nature of it. The Legislature has excepted the word "trustee" only. If notice of a trust on which a charge is held should get on the register, then upon a transfer of such charge being tendered for registration I should have to ascertain who the beneficiaries were and to require evidence of the consent of all the beneficiaries

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to the transfer because the title to a charge is guaranteed by the Province in the same way as the title to land.

In *Re McKinley and McCullough* (1919), 46 O.L.R. 535, the Appellate Division held that the words "in trust" are only constructive notice of a trust, and that, under the provisions of the Registry Act, constructive notice will not bind a purchaser to inquire, in the absence of actual notice. There is no such provision in the Land Titles Act, and the words "in trust" would be constructive notice of a trust.

March 28. The appeal was heard by LOGIE, J., as in Chambers, at a sittings of the Weekly Court at Ottawa.

*E. P. Gleeson*, for the appellant corporation.

The Local Master, in person.

April 9. LOGIE, J.:—The learned Master refused to register the charge in question, on the ground that the description of the corporation "as executor of the last will of Patrick H. Cassidy" or "as executor of Patrick H. Cassidy" would be entering on the register notice of a trust, express, implied, or constructive, upon which the corporation holds such charge, contrary to subsec. 1 of sec. 95 of the Land Titles Act, R.S.O. 1927, ch. 158.

With the deepest respect for the opinion of the learned and experienced Master, I cannot agree.

Subsection 1 of sec. 95 first appeared in the original Ontario Act of 1885, 48 Vict. ch. 22, sec. 85, and was practically a transcript of a similar provision in the English Land Transfer Act of 1875.

Feeling, no doubt, that it was impracticable on all occasions to avoid a reference to a trust, and recognising the hardship which the section as it then stood would impose upon persons dealing with an owner of any land or charge in actual practice, as exemplified later by *Cumming v. Landed Banking and Loan Co.* (1893), 22 Can. S.C.R. 246, subsec. 2 was added in the R.S.O. 1887, ch. 116, to sec. 85. By this subsection, the mere description of an owner as a trustee, whether the beneficiary of the trust is or is not mentioned, shall not be notice of a trust within the meaning of the section, thus relieving the person dealing with the owner of the duty of making inquiry as to the power of the owner in respect of the land or charge or of seeing to the application of the money.

Does, then, the description of an owner, whether of the land or a charge, as "executor" give notice of any trust, express, implied, or constructive? Logie, J.  
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Executors take upon themselves the burthen of the execution of the will and the administration of the estate. To that extent they are also trustees. RE  
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Speaking generally, their duties comprise, among other things, the duty of proving the will, paying debts and legacies, and rendering an account; thereafter they become trustees.

Subject to any statutory limitations, an executor has an absolute power of disposal over the whole estate of his testator, and, except where there is collusion between the executor and the purchaser, the assets cannot be followed into the hands of an alienee; nor is a purchaser bound to see to the application of the purchase-money: Williams on Executors, 11th ed., p. 693 *et seq.* But he is of course personally liable for all breaches of the ordinary trusts which are considered to arise from his office: *In re Marsden* (1884), 26 Ch. D. 783, 789.

It does not appear from the material before me when the executors became possessed of the assets of Cassidy's estate, or whether they have paid the debts or passed their accounts, or even if the will contemplated any period at which the executors were to lose their character as such and become mere trustees, but, after all the debts are paid, the executors may become trustees, and after the lapse of years there is a sufficient presumption that an executor dealing with assets is so dealing *quâ* trustee and not as executor: *Cumming v. Launder Banking and Loan Co.* Moreover, the converse is true, that trustees to whom the testator's personal estate is given, subject to a charge of debts, or who are to hold and administer in trust all the estate, are in effect executors: *In Bonis Baylis* (1864), 1 P. & D. 21; *In Bonis Bell* (1878), 4 P.D. 85; *In Bonis Way*, [1901] P. 345; *In Bonis Palmer* (1882), 11 L.R. Ir. 1; *In Bonis Hamilton* (1886), 17 L.R. Ir. 277; *In Bonis Gray* (1888), 21 L.R. Ir. 249.

It is true that the Land Titles Act does not contain any provision such as is contained in the Registry Act, R.S.O. 1927, ch. 155, secs. 70(1), 71, and 72, considered in *Re McKinley and McCullough*, 46 O.L.R. 535—no doubt because the section of the Land Titles Act in question here was considered sufficient—but I am of opinion, nevertheless, for the foregoing reasons, that the

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CASSIDY. description of the Capital Trust Corporation as "executor of Patrick H. Cassidy" is not notice of any trust, express, implied, or constructive, and the entry thereof on the register does not contravene the Act, which, indeed, by other sections, 57 and 59, expressly authorises the executor of a deceased owner to be registered as such on such transmission by death.

For the purposes of the subsection in question, "executor" is but another way of describing a trustee.

I may add that from anything that appears in the material, the Capital Trust Corporation might have avoided all discussion by accepting the Master's reasonable request that it should describe itself as a trustee.

Upon inquiry I find that the Master of Titles at Toronto accepts documents describing the owner of a charge as "executor of . . . deceased."

The appeal should be allowed; no costs.

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[LOGIE, J.]

1931. ENGLAND V. DOMINION OF CANADA GENERAL INSURANCE CO.  
April 10. *Insurance (Automobile)—Action against Insurer for Amount of Unsatisfied Judgment Recovered by Plaintiff against Insured—Insurance Act, R.S.O. 1927, ch. 222, sec. 85 (1)—Statutory Conditions 8 (2), (3), sec. 175—Defences to Action—Delivery of Policy—Voluntary Assumption by Insured of Liability to Plaintiff—Written Statement of Insured—Admission of Liability—Estoppel.*

In an action brought by a judgment creditor of McK. against an insurance company, under sec. 85 (1) of the Insurance Act, R.S.O. 1927, ch. 222, for the amount of an unsatisfied judgment recovered by the plaintiff against McK. for damages for injury sustained by the plaintiff on the 18th April, 1930, when a motor-car, owned and operated by McK., in which the plaintiff was a passenger, which was insured by the defendant company in respect of such occurrences, was overturned in a ditch in a highway:—

*Held*, that to succeed (sec. 87 of the Highway Traffic Act, as enacted by sec. 6 of the Highway Traffic Amendment Act, 1930, not applying by reason of the date of the accident) the plaintiff must establish liability on the policy against the defendant company to the same extent as if the action had been brought by McK., and whatever defences the defendant would have been entitled to raise against McK. it may raise against the plaintiff.

At the trial the plaintiff proved the agreement to indemnify; that the bodily injury to him had been inflicted by McK.'s automobile; that McK. was legally liable in damages to the plaintiff for the injuries inflicted; and that the execution against McK. was unsatisfied.

The defendant company alleged: (1) that the policy was not in force at the time of the accident: (2) that, if it was in force, the company was relieved from liability by McK.'s breach of statutory condition 8 (2), sec. 175 of the Insurance Act:—

*Held*, that, as the application for insurance was duly accepted and the premium paid, there was a valid agreement to insure; and, although the policy was not delivered to McK. until after the accident, it was, upon the evidence, delivered unconditionally; and, even if it was delivered without prejudice to the company's rights, the company could not impose conditions upon delivery of the policy which were not provided for by the contract.

*New York Life Insurance Co. v. Dubuc*, [1926] S.C.R. 272, followed.

And *held*, that McK., by giving the plaintiff a written statement to the effect that he (McK.) was responsible for the accident by which the plaintiff was injured, voluntarily assumed liability to the plaintiff, the assumption of liability mentioned in statutory condition 8 (2) not referring to liability non-existent by the terms of the policy.

*Caddedu v. Mt. Royal Insurance Co.*, [1929] 2 D.L.R. 867, 875, followed.

The words in condition 8 (2) "whenever requested by the insurer" may govern the words "shall co-operate with the insurer," and no request was made to McK.; but the words "whenever requested by the insurer" do not govern the words "the insured shall not voluntarily assume any liability," and the statements made by the plaintiff and McK. indicate collusion between them or at least the assumption of liability by McK.

McK.'s failure to notify the company of his change of address was a failure to co-operate with the defendant company in the defence of the action brought by the plaintiff against McK., and was the direct cause of the company's failure to request him to co-operate. The contention of the company that the giving of the statement by McK. was an interference by him in the negotiations for a settlement that were then pending could not be sustained, there being no evidence that McK. was aware of the negotiations.

But the company, in undertaking and continuing the defence of the action brought by the plaintiff against McK., although the latter had not been communicated with, admitted liability and could not afterwards repudiate that liability.

The *Caddedu* case, *supra*, and *Vandepitti v. Preferred Accident Insurance Co.*, [1930] 4 D.L.R. 654, followed.

By leave given at the trial, the plaintiff amended his reply by alleging estoppel; and it appeared that at the trial of the plaintiff's earlier action the statement of McK. was put in by the plaintiff in reply, at which stage it was too late to withdraw from the trial. The claim that was stated on behalf of the plaintiff in the correspondence was alleged and proved at the trial.

ACTION brought by Grover England, a judgment creditor of Robert S. McKinley, suing on behalf of himself and all other persons having similar judgments or claims against McKinley, against the Dominion of Canada General Insurance Company, under sec. 85 (1) of the Insurance Act, R.S.O. 1927, ch. 222, for the amount of an unsatisfied judgment recovered against McKinley for damages for injury sustained by the plaintiff on the 18th

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April, 1930, when a motor-car, owned and operated by McKinley and insured by the defendant company, was overturned on the road to St. Thomas in a ditch in the King's Highway No. 3.

March 25. The action was tried by LOGIE, J., without a jury, at St. Catharines.

*A. Courtney Kingstone*, K.C., and *G. M. Lampard*, for the plaintiff.

*P. E. F. Smily*, for the defendant company.

April 10. LOGIE, J.:—The plaintiff was given leave at the trial to amend his reply by setting up a plea of estoppel. To succeed (sec. 87 of the Highway Traffic Act, as enacted by sec. 6 of the Highway Traffic Amendment Act, 1930, not applying owing to the date of the accident) the plaintiff must establish liability on the policy against the defendant to the same extent as if the action had been brought by the insured, and whatever defences the defendant would have been entitled to raise against the insured it may raise against the plaintiff.

Had McKinley paid the judgment and brought an action against the defendant, he must have established: (1) the agreement to indemnify; (2) that the bodily injury to another insured against had been inflicted by his automobile; and (3) that he was legally liable in damages to the plaintiff for the injuries received by him: *Continental Casualty Co. v. Yorke*, [1930] S.C.R. 180, at p. 185. The plaintiff at the trial sufficiently proved these matters, and that the execution against McKinley was unsatisfied.

The defendant, however, alleged: (1) that the policy was not in force at the time of the accident, having been delivered after the date thereof, "without prejudice to the company's rights with respect to the accident;" (2) that, if the policy was in force, the company is relieved from liability by reason of the breach by McKinley of statutory condition 8 (2) (R.S.O. 1927, ch. 222, sec. 175):—

"The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceedings, but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witnesses, and shall co-operate with the insurer, except in a

pecuniary way, in all matters which the insurer deems necessary in the defence of any action or proceeding . . . ”

And condition 8 (3) provides:—

“No action to recover the amount of a claim under this policy shall lie against the insurer unless the foregoing requirements are complied with . . . ”

Subsection 1 of sec. 85 of the Insurance Act, R.S.O. 1927, ch. 222, dealing with the right of a claimant against the insurer where execution against the insured has been returned unsatisfied, provides that the person injured “shall have a right of action against the insurer . . . subject to the same equities as the insured would have if the said judgment had been satisfied;” and in the case at bar the company claims that the equities in its favour are (a) that McKinley voluntarily assumed liability by reason of a statement (exhibit 5) given to the plaintiff by McKinley and introduced in reply in the action of *England v. McKinley*, in which the judgment sued on was recovered; and (b) did not co-operate with the insurer in the defence of that action by failing to communicate his address to the defendant and by absenting himself from the trial.

As to (1) the application for the insurance was duly accepted, the premium paid, and there was a valid agreement to insure: *Anglo-American Insurance Co. v. Le Baron* (1912), 2 D.L.R. 877.

The policy (exhibit 2) states “policy period shall be from noon on the 15th April, 1930, until noon on the 15th April, 1931.” The agent of the company, Mr. D. A. Walker, called as a witness for the plaintiff, said that the policy was delivered to McKinley about ten days after he received the application (and therefore after the accident), and that he made no condition of delivery. He said: “I did not deliver the policy without prejudice. I just delivered it.” But, even if the policy were delivered without prejudice, it is clear that the case of *New York Life Insurance Co. v. Dubuc*, [1926] S.C.R. 272, is an answer. In that case it was stated (p. 276) that “the company could not, consistently with its obligations, impose conditions upon the delivery of the policy which were not provided for by the contract.”

As to (2) I am of opinion that McKinley, in giving a statement (exhibit 5) to the plaintiff, did voluntarily assume liability to England. It is contended that the assumption of liability in statutory condition 8(2) must refer to liability non-existent by the terms of the policy. I do not agree with this, but prefer to

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follow the reasoning of Macdonald, J.A., in *Cadeddu v. Mt. Royal Insurance Co.*, [1929] 2 D.L.R. 867. In that case the plaintiff, at the request of one Morton, acting on behalf of Dickson, the injured man, went to Morton's office and there related the circumstances of the accident, and at Morton's request affirmed his statement by a statutory declaration, and it was contended that the making known of certain facts which militated against the chances of the defendant successfully defending the other action was a breach of the condition "not to voluntarily assume any liability." Macdonald, J.A., at p. 875, says:—

"I think there was a breach of the statutory conditions. Respondent should not have gone to see Morton and innocence or ignorance will not excuse him. He should not have taken Morton's letter to the appellant insurance company direct. What is more decisive, he should not—as he did—by his declaration, 'voluntarily assume any liability.' He did so by saying, 'I slightly misjudged the space,' and 'This turn was made too acutely,' and by referring to his car 'getting out of control'."

And again: "He in effect co-operated with the representative of Dickson. . . . But I do think that instead of going direct to the insurer with Morton's letter, he stepped into the enemy's camp and voluntarily assumed liability."

In the case at bar the breach of this condition is made clearer when the report made by McKinley of the 23rd April, 1930, is contrasted with his letter (exhibit 5), given to the plaintiff (used in *England v. McKinley*) in a lawyer's office at Niagara Falls under date of the 18th June, 1930. The statement in the report is as follows:—

"Between the hours of 8.30 and 9.30 a.m., we were travelling between Delhi and Tillsonburg at a rate of about between 30 & 35 M.P.H., the steering shimming (*sic*) a little but nothing to be alarmed about. I can't say what could really have happened to put the car into the ditch, but it seemed unavoidable."

The second statement (exhibit 5) is as follows:—

"Regarding the accident which occurred on April 18th, when the car which belongs to myself, R. S. McKinley, of Niagara Falls, Ont., and of which Grover England was a passenger whom I invited to come for the drive to St. Thomas, Ont.

"The said car, a blue coupé, was just recently purchased by me and I had not been driving for a long time previous to this accident, also I am not by any means a good driver."

"Young England had warned me on several occasions. We (*sic*) driving too fast and also on making turns. The same day the accident occurred. A few minutes before the said accident occurred, he, England, had said 'Slacken up,' as I had been unconsciously driving fast. When the accident occurred, I had my left hand in my coat-pocket to get a handkerchief. I then felt the car swerve. I then gave the wheel a quick turn, losing control of the car. I feel that I am in every way responsible for this accident."

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It is difficult to conceive that McKinley would have made these two conflicting statements if he had not been protected by insurance and had not desired England to recover. The letter (exhibit 5) bears on the face of it not only an admission "voluntarily assuming his liability," but it is an attempt to exonerate the plaintiff from contributory negligence, especially when read with England's statement taken shortly after the accident, which was as follows:—

"On Thursday Mr. McKinley ask (*sic*) me to go with him to St. Thomas. We were travelling on No. 3 Highway. Mr. McKinley was driving car, going at rate of between 30 and 35 mls. per hr., when all of a sudden the car started to shimie and headed for the ditch.

"I am of the opinion that he was cable (*sic*) of driving the car."

It is true that on a close reading of condition 8(2) the words "whenever requested by the insurer" may govern the words "shall co-operate with the insurer," and no request was made because the company could not get in touch with McKinley; but the words "whenever requested by the insurer" do not govern the words "the insured shall not voluntarily assume any liability," and I cannot but think that the three statements made by England and McKinley indicate bad faith or collusion between England and McKinley, or at least the assumption of liability on the part of McKinley.

As to (b), that McKinley did not co-operate with the insurer in the defence of the action of *England v. McKinley*, I think on the evidence that he did not co-operate, whether the words "whenever requested by the insurer" govern the words "shall co-operate with the insurer," or not. True he sent the writ to the defendants in a letter which had the address of the Loblaw Groceries on the heading. In fact, he had been manager of

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Loblaw's Groceteria at Niagara Falls, but at the time of service of the writ he had been transferred to Hamilton, and was working as store-manager in Ottawa-street for the same company. But he then left Loblaw's and went on his holidays for two weeks and stayed at St. Thomas and then went to Detroit and got a job at which he worked for six months. He says he left his forwarding address each time he moved, and, by ascertaining from Loblaw's the address of his boarding house in Hamilton, which was on the salary-sheet signed by him while he was in their employ, he could have been easily traced. But, although there is no condition of the policy requiring McKinley to notify the company of his change of address, I think he should have done this. He says himself that, although he knew that the action had been commenced, he did not communicate his address—"I thought I might be needed but I did not know." In fact he received notice of trial after the action had been disposed of. His failure to notify the company of his change of address was a failure to co-operate, and was the direct cause of the company's failure to request him to co-operate.

Again, the company claims that the giving of the paper (exhibit 5) was an interference by the assured in the negotiations for a settlement which were then pending. Negotiations were conducted by representatives of the defendant company with the plaintiff's solicitor between the 13th and the 17th June, but they were then declined. On the 18th June the insured gave the letter (exhibit 5) to the plaintiff, and, whether this had or had not any effect in stiffening the plaintiff's back, on the 27th June his solicitor wrote saying he would not consider any figure less than \$2,000 and regretted that a settlement could not be arrived at. I cannot sustain this contention, there being no evidence that McKinley was aware of the negotiations which were then pending.

I am of opinion, however, that the defendant company, in undertaking and continuing the defence of the original action, although McKinley had not been communicated with, admitted liability and cannot afterwards repudiate that liability, and in this I follow two British Columbia cases, *Caddedu v. Mt. Royal Assurance Co.*, [1929] 2 D.L.R. 867, and *Vandepitte v. Preferred Accident Insurance Co.*, [1930] 4 D.L.R. 654. The *Caddedu* case in its facts is very like this case. McPhillips, J.A., at p. 869, says:—

"And it is to be remarked that during the pendency of the

other action the solicitor for the defendant became aware of the fact that the plaintiff had made the statutory declaration complained of, being a statement of the particulars of the accident. Nevertheless the solicitor for the defendant continued to carry on the defence of the action—there was notice in this way through the solicitor to the defendant in this action, and continuing the defence constitutes estoppel. The defendant elected to take the chances of defeating the claim in litigation against the plaintiff, which if unsuccessful would be a liability that would fall, under the terms of the policy of insurance, upon the defendant.”

And at p. 875 Macdonald, J.A., says:—

“It was urged that appellant’s solicitor by continuing to act after knowledge was obtained in this way did not thereby elect to treat the policy as valid, because waiver is a question of intention . . . His action however in continuing to represent the insurance company in the Dickson action against the respondents was a clear indication not of an intention to repudiate but of an election to proceed in the hope that notwithstanding the declaration he might successfully resist the claim. He could only continue to act on the footing that the appellant company was vitally concerned.”

And again in *Vandepitte v. Preferred Accident Insurance Co.*, Galliher, J.A., in distinguishing the case of *Continental Casualty Co. v. Yorke*, [1930] S.C.R. 180, says ([1930] 4 D.L.R. at p. 656):—

“There is this distinction and I think it is a material one—that in the *Continental* case the company at no time took any part in the proceedings instituted against the insured; while here the company from the inception of the proceedings against J. Berry took over her defence as obligated by said s. E., and conducted the action on her behalf, pleading on her behalf to the claim with full opportunity of raising all defences which she might have to the claim, conducted the trial on her behalf, examined the witnesses and had the benefit of all advantages to be gained from a judgment in her favour which would accrue to them in freeing her from liability and hence itself as well.”

Again in *Parrott v. Western Canada Accident and Guarantee Insurance Co.* (1920), 53 D.L.R. 533, it was held, following *Fairbanks Canning Co. v. London Guaranty and Accident Co.* (1911), 133 S.W. Repr. 664, by the Saskatchewan Court of Appeal, that an accident insurance company which undertakes a defence to an

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action for damages for injuries sustained admits liability and cannot afterwards repudiate liability on the ground that the loss was one not covered by the policy.

That was a case in which the plaintiff was insured in the defendant insurance company for indemnity against accidents to his employees in the business of a steam-laundry. In his application, he stated that his machinery was guarded and he paid a premium based on that fact. An employee had her hand injured in a mangling machine that was not guarded. The defendant company entered into negotiations with the employee for the settlement of her claim and took charge of the defence of the action which she brought. Judgment was given in her favour, and the plaintiff, having paid the amount thereof, brought this action. The defendant denied liability on the ground that the machinery was unguarded, and the plaintiff contended that the stipulation in the policy that the machine should be guarded was waived by the company having defended the action. It was found that the defendant acquired knowledge of the machinery being unguarded in the course of the action and continued to defend until after judgment, and it was held that this action by the defendant amounted to an election, waiver, or estoppel, and that the plaintiff should succeed.

In the case at bar the only comment which could be made on the question of estoppel is that the statement exhibit 5 was put in by the plaintiff in *England v. McKinley* in reply and that then it was too late to withdraw from the trial. Counsel for the defendant in that case, who was retained by the defendant company, did not withdraw from the case or treat the giving of this statement as a breach by McKinley of the conditions of the policy. Instead, he went on and addressed the jury and took his chances of success. If he intended to rely on this letter being a breach of the conditions of the policy by McKinley, it was his duty to have there and then abandoned the defence, and the plaintiff then would have had two courses open to him, either to proceed to judgment or to discontinue the action without prejudice to his right to bring another action, in which latter action, by securing the attendance of McKinley he might be able to make the liability of the defendant absolute. I cannot think but that the plaintiff in the action against McKinley had the right to put in exhibit 5 in that action at the time he did, especially in view of the fact that no order for production was taken out by the defendant or

notice to produce served. If this elementary precaution had been taken, the contents of exhibit 5 would have been revealed to the defendant long before they were. The defendant's counsel however in that action were not taken by surprise because the letters which passed between Mr. Parker and Mr. Kingstone (exhibit 10) shew that the defendant company was fully aware, before the action was brought, of the exact nature of England's claim, regardless of any report which Parker said he obtained from England. The claim that was stated on behalf of the plaintiff in the correspondence is the precise one that was alleged and proved at the trial.

The plaintiff pleaded the provisions of para. (b) of subsec. 4 of sec. 87, Part XIII. of the Highway Traffic Act, as enacted by the Highway Traffic Amendment Act (1930), 20 Geo. V. ch. 47, sec. 6, which makes the liability of an insurer absolute despite the violation of the conditions of a policy by the insured. The defendant pointed out that by sec. 71(2), Part XIII. only applies "to offences . . . and judgments arising out of motor-vehicle accidents occurring . . . after the date of coming into force of this Part." Part XIII. came into force on the 1st September, 1930. It was argued on behalf of the plaintiff that the section was one merely affecting procedure in an action under sec. 85 (1) of the Insurance Act, and was retrospective in its operation and a complete answer to the defence, but this contention was felt to be untenable and was abandoned.

In the result there will be judgment for the plaintiff for the amount of the judgment in the action of *England v. McKinley*, \$640, with interest and costs of that action and also the costs of the action at bar.

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*Insurance (Automobile)—Action by Persons Injured against Insurance Company Insuring Injurer against Claims — Unsatisfied Judgment—Insurance Act, R.S.O. 1927, ch. 222, sec. 85(1)—Defence — Cancellation of Policy—Notice of Cancellation—"Registered Mail" from United States—Statutory Condition 13(2) (sec. 175)—Notice, when Effective.*

The plaintiffs, who had recovered a judgment against B. for damages for bodily injuries suffered by them in a highway collision with B.'s truck, the judgment being unsatisfied, sought to recover from

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the defendant company, which had insured B. against liability "imposed upon him by law for damages on account of bodily injury accidentally sustained" by other persons, the amount of their judgment against B., by virtue of the provisions of sec. 85(1) of the Insurance Act. The sole defence was that the company's policy was cancelled before the day of the accident. By clause 2 of the 13th automobile statutory condition (sec. 175), which formed part of the contract of insurance, the policy might "be cancelled at any time by the insurer giving to the insured 15 days' notice in writing of cancellation by registered mail or 5 days' notice of cancellation personally delivered." The policy was dated the 3rd June, 1929, and was for one year. The accident took place on the 28th August, 1929. The notice of cancellation on which the company relied purported to notify B. that the policy was cancelled, such cancellation to become effective on the 3rd August, 1929. This notice was mailed by United States registered post on the 17th July, 1929, and was received by his wife on the 20th July, 1929, at his home in Windsor, Ontario. There was no evidence that it came to B., and he denied having received it:—

*Held*, that "registered mail" in statutory condition 13(2) means Canadian registered mail, and the notice was not within the contemplation of B.'s contract with the defendant company.

And *held*, that a notice of cancellation will be effective under 13(2), if in other respects sufficient, in 15 days from the date of its receipt at the address of the insured; and this notice was, therefore, not effective and the policy was not cancelled.

*Bank of Commerce v. British America Assurance Co.* (1889), 18 O.R. 234, followed.

*Veltre v. London and Lancashire Fire Insurance Co.* (1917), 40 O.L.R. 619, and *London and Lancashire Fire Insurance Co. v. Veltre* (1918), 56 Can. S.C.R. 588, referred to.

ACTION by Clapp and his infant daughter, who had recovered a judgment against one Barker for \$7,200 in an action for damages for bodily injuries suffered by the plaintiffs in a highway collision with Barker's truck, the judgment being unsatisfied, to recover from the defendant company, which had insured Barker against liability "imposed upon him by law for damages on account of bodily injury accidentally sustained" by other persons, the amount of the plaintiffs' judgment against Barker. The relief was claimed by virtue of the provisions of sec. 85(1) of the Insurance Act, R.S.O. 1927, ch. 222.

The action was tried by RANEY, J., without a jury, at Sandwich. R. S. Rodd, for the plaintiffs.

A. J. Gordon, for the defendant company.

April 13. RANEY, J.:—The plaintiffs, father and infant daughter, recovered judgment against Justine Barker—the father for \$700 and the daughter for \$6,500—in an action for damages for bodily injuries suffered by them in a highway collision with Barker's truck.

A writ of execution was issued against Barker, and the sheriff made a return of *nulla bona*. Barker carried insurance with the defendant company against liability "imposed upon him by law for damages on account of bodily injury accidentally sustained" by other persons; and the present action is brought, pursuant to sec. 85 of the Ontario Insurance Act, R.S.O. 1927, ch. 222, to compel the insurance company to pay to the plaintiffs the amounts of their judgment.

The sole defence raised by the insurance company is that its policy was cancelled prior to the date of the accident.

Clause 2 of the 13th automobile statutory condition (sec. 175 of the Act), which formed part of the contract between the parties, is in these terms:—

"This policy may be cancelled at any time by the insurer giving to the insured fifteen days' notice in writing of cancellation by registered mail, or five days' notice of cancellation personally delivered . . . ."

The policy was dated the 3rd June, 1929, and was for one year. The accident took place on the 28th August, 1929.

The notice of cancellation put forward by the insurance company was in these terms:—

"Notice of Cancellation.

"Hartford, Conn., July 17, 1929.

"Justine Barker,  
401 Langlois-avenue,  
Windsor, Ont.

"You will please take notice that policy as described below heretofore issued to you by this company is cancelled in accordance with its terms, because of non-payment of premium, such cancellation to become effective on the date given below, at twelve o'clock noon.

"Premium adjustment to date of cancellation will be made in accordance with the provisions of the policy.

"The Travelers Indemnity Company.

"Policy No. CFA—1712098. Effective date of cancellation August 3, 1929."

This notice was mailed by United States registered post at Hartford, Connecticut, on the 17th July, 1929, and was received by Barker's wife, at his home in Windsor, on the 20th July, 1929.

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There was no evidence that the notice ever came to Barker, and he denied having received it.

The insurance company's contention is that the notice was effective from the date of its deposit in the post-office at Hartford.

The contentions of the plaintiffs are: (1) that the notice was not effective in the absence of evidence that it had been actually received by Barker; and (2) in the alternative, that notice of cancellation could be effective at the earliest, under clause 2 of the 13th statutory condition, from the date of its delivery at Barker's address.

But there is an earlier difficulty in the way of the defence. The insurer under the statutory condition above quoted has the option of sending the cancellation notice by registered mail, or of delivering it to the insured personally. In this case the insurer chose, or meant to choose, the registered mail. What is "registered mail?" I think the words mean Canadian registered mail. Canadian registered mail is the only registered mail known to the law of Ontario. Besides that, if the words were to be construed to connote foreign registered mail, there would be no reason for limiting their application to this continent, and the result might be that registered mail posted in, say, a European country might not in the ordinary course of mail reach the insured person in Ontario within the 15-day period. On the narrow ground that "registered mail" in statutory condition 13(2) means Canadian registered mail, I think the notice of cancellation that was sent by the defendant company from Hartford, Connecticut, by United States registered mail, was not within the contemplation of Barker's contract with the defendant company.

This is sufficient, in my view, to dispose of the case; but, perhaps, I ought to express a view on the questions that were argued by counsel. These questions were: (1) Does the notice of cancellation, when sent by an insurance company by registered mail, become effective when it is deposited in the post-office? or (2) not until it is delivered at the address of the insured? or (3) not until actually delivered to the insured in person? These are rather important questions, alike to insurers and insured.

The present automobile statutory conditions were first enacted in the Ontario Insurance Amendment Act, 1922, 12 & 13 Geo. V. ch. 61, sec. 14, whereby sec. 198(g) was added to the Ontario Insurance Act, R.S.O. 1914, ch. 183. These statutory

conditions are an adaptation of the general statutory conditions which were applicable before that time to policies of insurance on any property in Ontario (R.S.O. 1914, ch. 183, sec. 194).

Prior to the Act of 1922, the general statutory conditions were applicable to automobile insurance. Statutory conditions 11 and 15 of these general statutory conditions provided that "the insurance may be terminated by the company by seven days' notice to that effect," and that "any written notice to the insured may be by letter delivered to . . . or . . . by registered letter addressed to him at his last post-office address notified to the company." These statutory conditions came up for consideration in *Veltre v. London and Lancashire Fire Insurance Co.* (1917), 40 O.L.R. 619, and *London and Lancashire Fire Insurance Co. v. Veltre* (1918), 56 Can. S.C.R. 588. In the Supreme Court of Canada, Mr. Justice Anglin (56 Can. S.C.R. at p. 599), concurring with the other members of the Court in dismissing the insurance company's appeal, used the following language:—

"It would be a strong thing to hold that the insurer could extinguish the contractual rights of the insured under his policy without any prior actual notice being given to him. In the absence of an explicit statement that notice of cancellation should be deemed effectual from the time at which it would in the ordinary course of post have reached the insured, nothing short of an irresistible inference from the terms in which the condition providing for notice by post is couched that that was the purpose and intention of the Legislature would suffice to justify a court in holding that the contractual rights could be thus extinguished."

The Chief Justice of the Court concurred in the reasons of Mr. Justice Anglin. Other members of the Court gave narrower reasons for dismissing the appeal.

In his reasons for judgment in the Appellate Division of the Supreme Court of Ontario, Mr. Justice Hodgins had expressed a view (see p. 629 of 40 O.L.R.) that "where what is to be accomplished by a notice is cancellation of an existing contract, and where that notice is unexpected by the other party, and till received is still subject to recall, it can be effective in terminating the obligation only if and when it reaches that other party."

The trial Judge, Mr. Justice Sutherland, had been of the opinion that the notice was effective when despatched by registered mail, and with this view the Chief Justice of Ontario concurred

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Raney, J. in his reasons delivered on the appeal: (See pp. 619 and 630 of  
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It is, I think, a reasonable assumption that the draftsman of the Act of 1922 had both the old statutory conditions and the *Veltre* case before him when drafting the new automobile statutory conditions. The old statutory condition as to cancellation by the insurer had not differentiated, as to length of notice, between the notice delivered to the insured person and one sent to him by registered letter. In either case the length of the notice was seven days. The new conditions as contained in the Act of 1922, and as they appear in the present Act, in respect both of automobile and of fire insurance, provide for five days' notice in case of a notice personally delivered and fifteen days in case of a notice sent by registered mail. In view of the language of Mr. Justice Anglin and Mr. Justice Hodgins, above quoted, one would have expected that, if the intention of the Legislature was to make the notice effective from the time of the delivery of the registered letter at the address of the insured, the Legislature would have made an explicit declaration to that effect. Much more would one have expected the Legislature to make an explicit declaration to that effect, if the intention had been to make the notice effective from the date of the despatch of the notice by the insurance company by registered mail. But some effect ought to be given to the very definite departure in the provision for notice in the present statutory condition 13(2), from the terms of statutory conditions 11 and 15 of the old law; and, in the absence of an explicit declaration from the Legislature, I think the Court ought to give the insured the benefit of the alternative which is the less disadvantageous to him. Obviously it would be more in his interest that the notice should be effective from the date when it actually reaches his address (even though not delivered to him personally), than from the time of its despatch from the office of the insurance company. And perhaps some colour is given to this construction of the statutory condition 13(2) by the fact that in the statute as it existed prior to the revision of 1912 (sec. 194, ch. 33 of the statutes of that year), the provision was for five days' notice where the service was personal and for seven days' notice from the arrival at any post-office in Ontario, where it was by registered letter. (See R.S.O. 1887, ch. 167, sec. 114, clause 19, and R.S.O. 1897, ch. 203, sec. 168, clauses 19 and 23).

My conclusion is that a notice of cancellation by an insurance company of its automobile insurance policy will be effective under statutory condition 13(2), if in other respects sufficient, in 15 days from the date of its receipt at the address of the insured. This construction, I think, imposes no great hardship on the insured. The presumption will be that registered mail which has been delivered at the address of the insured will come to his notice in due course, or in his absence to the notice of somebody authorised by him to look after his affairs.

But there remains the question whether a notice specified to be effective within less than 15 days from the date of its receipt at the address of the assured is, nevertheless, effective at the expiration of the 15 days after its receipt.

It will be observed that under the terms of the notice of cancellation in this case, the notice was to be effective on the date "given below at twelve o'clock noon." The date "given below" as the "effective date of cancellation" was the 3rd August, 1929. The notice was actually delivered at Barker's address on the 20th July. There were not 15 days between that date and the 3rd August.

This question was also discussed by Mr. Justice Anglin in the *Veltre* case. He says at pp. 601 to 603 of 56 Can. S.C.R.:—

"Since a power of cancellation must, no doubt, be strictly exercised, I was at first much impressed with the view that because the company's letter expressed its intention to terminate the risk on the 22nd of December its notice could not be good for any subsequent date. But on further consideration I incline to think otherwise . . . . The notice of intention to cancel need not specify any date as that on which the risk is to come to an end. When it is given the statutory condition applies and effects the cancellation on the expiry of seven days. The statement of the date on which the notice is to become effective is therefore superfluous. The insured knows, or must be presumed to know, that he is entitled to seven days from the time at which he receives the notice. I therefore incline to the opinion that if the plaintiff had actually received the notice of cancellation seven days before the fire occurred she could not have recovered on the policy."

In the case now under consideration, there was 13 days' notice between the day of the delivery of the registered letter at the address of the insured and the "effective date of cancellation" as stated in the notice. If the form of the notice of cancellation sent

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by the insurance company had been that at the expiration of 15 days from the delivery of the registered letter at the address of the insured the policy would be cancelled, the notice would have been effective from and after the 5th August, 1929. Notice in that form would have been sufficient. The company chose to tell the insured that the "effective date of cancellation" was the 3rd August, 1929. Applying the language of Mr. Justice Anglin, that notice was sufficient, assuming, of course, that the notice became effective from the date of its delivery at the address of the insured. But, if 13 days' notice is effective, not to cancel the policy at the expiry of that time, but at the expiry of 15 days, then why not 2 days' notice or one day's notice? Or why not a notice of the immediate termination of the risk?

This last question was the very point at issue in *Bank of Commerce v. British America Assurance Co.* (1889), 18 O.R. 234, a case that was cited in argument by counsel in the Supreme Court of Canada in the *Veltre* case, but not referred to by Mr. Justice Anglin in his reasons. In that case it was held by a Divisional Court composed of Chief Justice Galt, Mr. Justice Rose, and Mr. Justice MacMahon (the Chief Justice dissenting), that the statutory notice of cancellation should inform the insured that the policy will be terminated at the end of the prescribed statutory period after the service of the notice, and, where the company had given a notice which was in effect an immediate cancellation, that the policy had not been cancelled.

In his reasons, Mr. Justice Rose said (at p. 238):—

"The notice should advise the assured that he has five days within which to make other provision for insurance, thus avoiding the gross unfairness pointed out by Mr. Justice Strong in *Caldwell v. Stadacona Fire and Life Insurance Co.* (1883), 11 Can. S.C.R. 212, at p. 238, of 'not providing that notice should be given a reasonable time before the cancellation should take effect, so that the assured might have the opportunity of covering himself by another insurance.'" And at p. 239: "In my opinion the letter . . . is defective in declaring the contract to be at an end forthwith instead of at the expiry of five days."

Mr. Justice MacMahon concurred in this view, citing a Rhode Island authority, which, rather singularly, was later cited by Mr. Justice Anglin in the *Veltre* case as authority for the

opposite conclusion: *Emmott v. Slater Mutual Fire Insurance Co.* (1863), 7 R.I. 562. Raney, J.  
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Whatever my own view may be, I am bound by the judgment of the Ontario Divisional Court.

If, therefore, the words "registered mail" in the automobile statutory condition 13(2) can be interpreted as including United States registered mail, then I am of the opinion that the notice delivered at the home of Barker, the insured, on the 20th July, 1929, was not effective to cancel Barker's policy of insurance with the defendant company. But I prefer to base my judgment on the ground first stated, namely, that "registered mail" in statutory condition 13(2) means Canadian registered mail.

There will be judgment for the plaintiffs for the amounts of their judgment in the action against Barker, with interest, and including the costs of that action, and for the costs of this action.

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[WRIGHT, J.]

DAVIDSON V. LAURENTIAN INSURANCE CO.

*Insurance (Fire)—Action on Policy—Premises Unoccupied at Time of Fire but not for 30 Consecutive Days—Insurance Act, R.S.O. 1927, ch. 222, sec. 98(2), condition 5(d)—Onus.*

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April 15.

In an action upon a policy of fire insurance covering buildings and contents thereof on a farm, the main defence was that at the date of the fire the premises were unoccupied, that this condition was material to the risk, and, as no notice had been given to the defendant company, the policy was thereby voided. Statutory condition 5(d) provides that, "unless permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring . . . (d) when the building insured or containing the property insured is, to the knowledge of the insured, vacant or unoccupied for more than 30 consecutive days." The fire occurred within 30 days after the removal of the household furniture from the house:—

*Held*, applying *Metcalfe v. General Accident Assurance Co. of Canada* (1929), 64 O.L.R. 643, that the onus of establishing a breach of a statutory condition was upon the defendant company; and that, as the premises were not vacant for 30 consecutive days, the onus was not met, and the policy was in full force at the time of the fire.

ACTION upon a fire insurance policy, tried by WRIGHT, J., without a jury, at a Toronto sittings.

N. L. Mathews, for the plaintiff.

N. Phillips, K.C., for the defendant company.

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April 15. WRIGHT, J.:—This action is brought by the plaintiff upon a policy of fire insurance issued by the defendant company and dated the 24th August, 1928, covering certain buildings and contents thereof on a farm in the township of North Gwillimbury, owned by the plaintiff. The fire occurred on the night of the 20th March or the early morning of the 21st March, 1930.

Several defences were set up by the defendant company, *inter alia* that there was over-valuation in the proofs of loss and in the application for insurance.

These issues I find in favour of the plaintiff.

The main defence relied upon by the defendant company was that at the date of the fire the premises were vacant or unoccupied, that this condition was material to the risk, and, as no notice had been given to the defendant company, the policy was thereby voided.

The evidence disclosed that on the 20th February, 1930, the plaintiff moved the major portion, estimated by him as three-fourths, of his furniture from the house on the premises. He testified that after he moved he endeavoured to rent or sell the farm, in which efforts he was unsuccessful up to the time of the fire.

As appears from the proofs of loss, a considerable quantity of farm produce and some implements were allowed to remain in the barn.

For the defendant company it is contended that the premises were vacant or unoccupied, and that this operated as a change material to the risk, which, by virtue of statutory condition number 7, voided the policy.

In order to establish the contention that the change was material to the risk, three persons of wide experience in fire insurance were called as witnesses who testified that vacancy was a material consideration in deciding upon the acceptance of an application and also in fixing the premium to be charged.

Two of these witnesses testified that in case property of the nature in question became vacant the proper and usual practice followed by insurance companies would be to cancel the policy or charge an additional premium.

The other witness, William Laidlaw, who had 25 years' experience, held to the view that the policy would be carried for

30 days, and thereafter would automatically lapse by virtue of statutory condition 5(*d*).

The fire occurred within 30 days after the removal of the household furniture from the house.

The defendant company's counsel contends that the proper construction to be placed on statutory conditions 5(*d*) and 7 is that the policy becomes void *ipso facto* after the premises are vacant for 30 consecutive days, and during that period if the vacancy is material to the risk, the policy becomes void immediately upon the premises becoming vacant.

It is contended for the plaintiff that under statutory condition 5(*d*) he is entitled to recover, as the property was not vacant or unoccupied for the period of 30 consecutive days, as stipulated in that condition.

Condition 5(*d*) reads as follows:—

"5. Unless permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring

. . . .

"(*d*) when the building insured or containing the property insured is, to the knowledge of the insured, vacant or unoccupied for more than thirty consecutive days."

The point does not appear to have been decided in any case since statutory condition No. 5(*d*) was enacted, although in some cases which I shall cite hereafter the matter was dealt with to some extent.

It has been held that vacancy *per se* is not a change material to the risk. See *Boardman v. North Waterloo Insurance Co.* (1899), 31 O.R. 525; *Reddick v. Saugeen Mutual Fire Insurance Co.* (1888), 15 A.R. 363. There are authorities which hold that vacancy is a change material to the risk, where it makes the risk more hazardous: *Western Assurance Co. v. Harrison* (1903), 33 Can. S.C.R. 473; *McKay v. Norwich Union Insurance Co.* (1895), 27 O.R. 251.

These cases however were decided before the statutory condition 5(*d*) was enacted, and while they are of some assistance yet they are not conclusive in support of the defendant's contention.

In *Wydrick v. Saltfleet and Binbrook Mutual Fire Insurance Co.* (1929), 64 O.L.R. 521, the question appears to have been considered by the Court, although it was not made the basis of decision. Mr. Justice Grant, at p. 525, refers to the matter and sug-

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gests that it may be open to question whether, as there is a special clause providing for a vacancy, the other provisions may not apply, but the point was not decided in that case.

In a subsequent case, *Metcalfe v. General Accident Assurance Co. of Canada* (1929), 64 O.L.R. 643, Mr. Justice Orde expressed his opinion that the statutory condition 5(d) was conclusive as to vacancy, and at p. 651 makes the following pertinent observation:—

“The obligation to remain in continuous occupation in order to keep the insurance alive seems in the very teeth of the implied permission to leave the place vacant for any period not exceeding 30 consecutive days.”

It will also be observed that in the *Wydrick* case Mr. Justice Grant states (64 O.L.R. at p. 525) that in his opinion the fact that the premises were vacant may, in combination with other material circumstances, be a factor contributing to make up, in the aggregate, such a changed condition as to be material to the risk which had been undertaken by the insurer. He does not decide that the vacancy alone would constitute a change material to the risk.

In the *Metcalfe* case it was held that the onus of establishing a breach of a statutory condition was upon the defendant company.

Applying that principle to the present case, the onus is upon the defendant company to shew that the vacancy, under the circumstances disclosed in evidence, is a change material to the risk.

It occurs to me that the Legislature in enacting statutory condition No. 5(d) intended to provide for the result or effect of vacancy of the premises insured, and that, as stated by Mr. Justice Orde, there was an implied permission for a vacancy not exceeding 30 consecutive days. This seems to be the reasonable view, otherwise if the premises were vacant for one day, and the vacancy was material to the risk, the policy would be voided.

I am of opinion therefore, although not without some doubt, that the defence fails and that, as the premises were not vacant for 30 consecutive days, the policy was in full force at the time of the fire.

There will be judgment for the plaintiff declaring that he is entitled to recover the amount of his loss up to the amount mentioned in the policy, and that in the event of failure to agree it be referred to the Master to determine the amount. The plaintiff is entitled to his costs of action and reference (if any).

## [APPELLATE DIVISION.]

## FRIGIDAIRE CORPORATION V. STEEDMAN.

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*Contract—Procurement of, by Payment of Secret Commission to Agent of Defendant—Fraud Invalidating Contract—Impossibility of Restitution—Remedy in Damages—Declaration—Damages—Reference.*

The plaintiff corporation sued the defendant for the price of a refrigeration plant furnished to and used by the defendant. Several defences were pleaded, and at the trial an amendment was allowed to be made by the defendant setting up that the contract was brought about by the payment of a secret commission to L., an agent of the defendant; and the trial Judge, upon that ground, dismissed the action, allowed the defendant to counterclaim for a refund of the down-payment with interest, and gave judgment for the defendant rescinding the contract and directing repayment with interest:—

*Held*, upon appeal, that the conduct of the defendant in operating the refrigerating apparatus made it impossible to reinstate the parties in their former positions, and the judgment must be set aside.

The defendant, however, was entitled to some relief: the presumption of fraud was irrebutable; and not only could the defendant sue his agent for the amount of the commission but he could sue the agent and the offending contractor for damages. In an action against the contractor, the amount of the commission is undoubtedly recoverable; and this did not prevent a proceeding for damages *dehors*.

Proper form of the judgment indicated.

ACTION on an agreement for the purchase by the defendant from the plaintiff corporation of a refrigeration equipment for stalls for a market in the city of Hamilton, owned by the defendant.

The action was tried by RANEY, J., without a jury, at Hamilton.

W. J. Beaton, for the plaintiff corporation.

H. A. F. Boyde, for the defendant.

April 14, 1930. RANEY, J.:—On the 3rd May, 1928, the plaintiff company tendered for the installation of refrigerators and counters for the defendant's market. The tender for the "insulation and construction" of the plant was to be "acceptable to Mr. Lord," and the installation was to be completed on the 1st June, 1928, under a penalty of \$300 per day after that date. On the same date, that is the 3rd May, 1928, the defendant accepted the tender with a modification of price, to which the plaintiff corporation agreed. By the terms of the acceptance the plaintiff corporation was to pay, and in fact did pay, \$2,400 cash, and for the balance of the contract price of \$24,000 it agreed "to furnish

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notes of the tenants payable according to the usual terms and conditions of the paper discounted by the General Motors Acceptance Corporation, 50 per cent. of the cash payment made by the tenants of the stalls enumerated in the tender to be repaid to me until I have been reimbursed the \$2,400." There were changes in the specifications, and in the result the work was not finished until the end of July, 1928.

The stalls were not rented, and, notes of the tenants not having been furnished to the plaintiff corporation as agreed, the action was brought in June, 1929, for the balance of the contract price, plus \$8,436.51 for extras: in all, the sum of \$30,036.51.

The defendant pleaded that "owing to the fact that the market was altogether too large for the neighbourhood which it was intended to serve, it was found impossible to obtain tenants," and that "the plaintiff well knew the fact that there were no tenants in the premises in which they had installed their refrigeration equipment, and that until there were tenants the notes of such tenants could not be handed to the plaintiff," and consequently that the plaintiff's action was premature.

As the pleadings stood when the case was entered for trial, it was virtually an undefended action. But on the eve of the trial the defendant examined Howard, the plaintiff corporation's sales-manager at its Hamilton branch, for discovery, and what was apparently a chance question elicited from Howard the information that he had agreed to pay Lord, to whom the insulation and construction of the plant were, according to the terms of the contract, to be acceptable, a commission out of the contract price.

At the opening of the trial, I gave leave to the defendant to amend his defence by alleging the agreement to pay a commission to Lord, and the pleading was accordingly amended by the addition of the following paragraph:—

"The plaintiff promised, before the execution of the contract upon which the plaintiff is suing, that it would pay to one W. J. Lord, an agent, employee and servant of the defendant, known by the plaintiff to be such, a secret commission on the sale of the refrigeration by the plaintiff to the defendant. The said secret commission was not disclosed to the defendant, and the contract upon which the plaintiff is suing is therefore illegal and void, or alternatively is voidable at the option of the defendant, and the defendant is entitled to have the said contract declared void,

or alternatively to have the same rescinded. The defendant pleads the provisions of the Criminal Code, R.S.C. 1927, ch. 36, sec. 504, subsec. 2, clause (b)."

Lord was the defendant's employee; he was the practical man, and the defendant relied upon his advice. These facts were known to Howard, who also knew that the defendant did not know that the plaintiff company was paying him a commission on the transaction. It must be assumed, as against the plaintiff corporation, that it intended the commission which Lord was to receive to influence him in its favour. In other words, it must be assumed as against the plaintiff company that the promised commission was a bribe.

It is not necessary to cite authorities to establish the proposition that a plaintiff who comes into court admitting facts from which the only possible inference is that the contract was induced by the bribery of a servant of the defendant will not have the assistance of the court. He who comes into a court of law—as well as he who comes into a court of equity—must come prepared to shew a clean pair of hands.

The action fails and must be dismissed with costs, limited; however, to the costs of the issue on which the defendant succeeds.

The defendant will have leave to counterclaim for a refund of the \$2,400 down payment with interest, and there will be judgment rescinding the contract and directing repayment, with interest. The defendant by his counsel consenting, the plaintiff will have leave to enter upon the defendant's premises and to remove its refrigerators and equipment upon an undertaking to restore the premises to the condition in which they were before the installation.

The plaintiff corporation appealed from the judgment of RANEY, J.

December 15, 1930. The appeal was heard by LATCHFORD, C.J., MAGEE, RIDDELL, and FISHER, JJ.A.

G. W. Mason, K.C., and W. J. Beaton, for the appellant corporation, argued that it was now impossible to restore the parties to their original positions, and, consequently, rescission of the contract could not be decreed: first, because of the delay on the part of the defendant in repudiating; secondly, because the equipment had been leased by the defendant to tenants of the market

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and had been used by them for many months; thirdly, because there was no evidence to shew that it was physically possible to remove any of the equipment from the market without wrecking or badly damaging the market; and, fourthly, because the property in all the equipment passed to the defendant on the 31st July, 1928. The measure of damages, if any, to which the defendant was entitled was the amount of the alleged commission of \$900. Reference to *Barry v. Stoney Point Canning Co.* (1917), 55 Can. S.C.R. 51; Halsbury's Laws of England, vol. 1, p. 217, para. 458; *In re Cape Breton Co.* (1884), 26 Ch. D. 221; *Ladywell Mining Co. v. Brookes* (1887), 35 Ch. D. 400; *City Bank v. Barrow* (1880), 5 App. Cas. 664; *Salford Corporation v. Lever*, [1891] 1 Q.B. 168; *Twigg v. Greenizen* (1922), 63 Can. S.C.R. 158.

*D. L. McCarthy*, K.C., and *H. A. F. Boyde*, for the defendant, respondent, contended that the law was well settled that rescission will be decreed where, as here, an agent of the defendant has been bribed by the plaintiff. The secret commission paid by Howard to Lord, the defendant's agent, was a bribe. Reference to *Greenberg v. Lake Simcoe Ice Supply Co.* (1917), 39 O.L.R. 32; *Alexander v. Webber*, [1922] 1 K.B. 642; *Addison v. Ottawa Auto and Taxi Co.* (1913), 30 O.L.R. 51; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218. The defendant, in these circumstances, was entitled to get back his money.

April 17. The judgment of the Court was read by RIDDELL, J.A.:—The plaintiff is a company which manufactures refrigerators, etc., and sues the defendant for the price of a refrigerating plant furnished him, and subsequently used by him. Several defences are set up, and at the trial, by reason of facts come to the knowledge of the defendant on the examination for discovery of an officer of the plaintiff, an amendment was allowed, setting up that the contract was brought about by one Lord, an agent of the defendant, being paid a secret commission.

Mr. Justice Raney, the trial Judge, on the ground of the contract being brought about by the payment of this secret commission, dismissed the action, and gave judgment for the repayment to the defendant of the amount already paid; the plaintiff appeals.

The facts sufficiently appear from the plaintiff's own witnesses—Lord, the owner, with his associates, of a market, had negotiations with the plaintiff looking to the installation of its plant in

this market; but, during the course of the negotiations, the defendant became the owner of the market, and the negotiations continued with him; a tender was submitted and accepted by the defendant, on the 3rd May, 1928, for \$24,563. That this was brought about by Lord is not and cannot be disputed, nor can the fact that the manager of the plaintiff company knew, when he was getting the contract through the efforts of Lord, that Lord was in the employ of the defendant and receiving wages from him. While the negotiations were going on with Lord, who with his associates owned the market, there had been an arrangement that Lord should be paid 10 per cent. of the purchase-price as a commission; when the defendant took over the property, he relied upon Lord as his agent to see that the contract was a proper one for him to enter into. Lord insisted with the plaintiff's manager that the arrangement should continue, and it was continued, the manager knowing that Lord was employed and paid by the defendant. The defendant, admittedly, knew nothing of this commission, until the fact was frankly disclosed on the examination for discovery of the plaintiff corporation's officer. Apparently, the manager saw no impropriety in so paying a secret commission to the servant of the defendant, through whose advice the defendant, as he knew, entered into the contract.

This is a species of fraud which would entitle the defendant to rescind the contract; but rescission cannot be the remedy unless restitution is possible and the parties can be remitted to their former positions: *Western Bank of Scotland v. Addie* (1867), L.R. 1 Sc. App. 145, 164; *Chynoweth's Case* (1880), 15 Ch. D. 13, 20; *Plant v. Wells* (1930), 37 O.W.N. 405, affirming the decision of Mr. Justice Raney (1929), *ib.* 47; and a still more recent case in this Court. Whether, as is suggested in certain cases, the rule only applies if the inability arises from the conduct of the party complaining, we need not consider, as here the conduct of the defendant in operating the refrigerating apparatus renders it impossible to reinstate the parties, if nothing else did. The result is, that the original contract cannot be rescinded, and the judgment entered must be set aside.

The defendant, however, is not without some relief; in such a case, no effect is given to a claim of good faith, the presumption of fraud is irrebuttable: *Shipway v. Broadwood*, [1899] 1 Q.B. 369; *Hovenden v. Millhoff* (1900), 83 L.T.R. 41; not only can

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- App. Div. the master sue the servant for the money: *Grant v. Gold Exploration and Development Syndicate Ltd.*, [1900] 1 Q.B. 233; *Panama and South Pacific Telegraph Co. v. India Rubber etc. Co.* (1875), L.R. 10 Ch. 515; but he can sue the agent and the offending contractor for damages.
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- FRIGIDAIRE CORPORATION v. STEEDMAN. In an action against the contractor, the amount of the commission is undoubtedly recoverable: *Salford Corporation v. Lever* (1890), 25 Q.B.D. 363, [1891] 1 Q.B. 168 (C.A.) But this does not prevent a proceeding for damages *dehors*.
- Riddell, J.A.

The proper judgment would be to declare the contract binding in its terms, with such relief as the plaintiff is entitled to under such a judgment; allow proper pleadings to be filed as in counterclaim; declare the defendant entitled to such damages as he may prove, referring it to the Master at Hamilton to determine these damages, with the costs of the reference in his discretion; order that there should be no costs of action or of appeal, as success is divided; further costs and directions to be determined on motion for further directions after the Master shall have made his report.

If the parties cannot agree on the form of the judgment, one of us may be spoken to.

*Appeal allowed in part.*

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[APPELLATE DIVISION.]

1930. HURST V. TOWNSHIP OF MERSEA.
- August 15. *Municipal Corporations—Township By-law—Expropriation of Land for Public Park—Whether in Interest of Public—Matter to be Determined by Council—Bona Fides of Councillors—Whether “Money By-law.”*
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A by-law passed by a township council expropriating for a public park land in which the plaintiff had an interest was attacked by her in this action upon the ground that it was not enacted in the public interest, but in the interest of a land company, and also upon the ground that it was a money by-law within the meaning of sec. 297 (1) of the Municipal Act, R.S.O. 1927, ch. 233; and, not having been submitted to the ratepayers for their approval, should be set aside:—

*Held*, following *Re Howard and City of Toronto* (1923), 61 O.L.R. 653, that, notwithstanding the charges made against the good faith of the members of the council, there was no evidence that they had not acted in the best of faith and with an honest desire to do their duty by their township and constituents; the matter was one to be determined by the council; and upon the first ground the by-law could not be quashed.

*Held*, as to the second ground, having regard to secs. 295 (1), 297 (1), 338 (1), and 342 (1) of the Municipal Act, that, assuming that the corporation does incur a debt by passing an expropriation by-law, this debt is incurred in a manner "otherwise provided by this . . . Act," i.e., by force of the Act itself (sec. 297 (1) ); and there is no illegality in the by-law, even though nothing regarding compensation appears in the estimates, and no money by-law is to be submitted.

*Per* MASTEN, J.A.:—The by-law does not create a debt—under the provisions of the Act, the corporation may withdraw after an award fixing the value has been made.

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ACTION to set aside a by-law of the Corporation of the Township of Mersea, the defendant.

The action was tried by GARROW, J., without a jury, at Sandwich.

*J. H. Rodd*, K.C., and *F. K. Jaspersen*, for the plaintiff.

*R. S. Robertson*, K.C., and *J. R. Morris*, for the defendant corporation.

August 15, 1930. GARROW, J.:—The plaintiff, as the widow of her deceased husband, who died intestate, has an interest in lot number 25, plan 737, of the township of Mersea.

By by-law number 568, passed on the 23rd December, 1929, the township council has expropriated and taken for a public park the lot in question, and has authorised the reeve and treasurer to pay to the owners of the land the sum of \$1,200. The by-law also provides for the acceptance by the municipal corporation of other lands therein described, to be used with lot 25 as a public park.

The plaintiff now in this action seeks to set aside the by-law on two grounds; first, that it was not enacted in the public interest, but really in the interest of the Tecumseh Land Company, the grantors, with one Marcon, of the park lands other than lot 25; and, second, that the by-law is a money by-law within the meaning of sec. 297(1) of the Municipal Act, R.S.O. 1927, ch. 233, and, not having been submitted to the ratepayers for their approval, should be set aside.

The facts are shortly as follows. The Tecumseh Land Company Ltd. is the owner of many of the lots shewn on plan 737. Running midway through the front tier of lots facing on Lake Erie there is a travelled roadway or "trail," as it is sometimes spoken of, which the company was desirous of having the township council close up. It was also desirous, if possible, of having the plan altered so as to make the boundaries of the lake front

Garrow, J. lots run at right angles to the line-up of the lake-shore, instead  
1930. of as they appear on the plan.

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With a view to this, Rankin, acting on behalf of the company, interviewed the owners of the lots affected, including the plaintiff, and, as he believed, secured her verbal consent to accept another lot in exchange for lot 25. He also had several interviews with the council as to closing the roadway, and three several by-laws providing for the establishment of a new roadway granted by the company and for the stopping up and sale of portions of the old were passed after notice published for four weeks in a local paper. No objection was taken by any of the interested parties to the passing of these by-laws, nor are they in any way attacked in these proceedings.

In exchange for a portion of the roadway, the council insisted upon obtaining from the company the equivalent in lake frontage to be used for park purposes, and the company, believing it could count on Mrs. Hurst's consent, offered the lands shewn on the plan as "proposed park," which lands include lot 25. Later it was found that the plaintiff would not agree to convey her lot, and the company then offered other lake-shore frontage to the north, which the council declined to accept. It was then suggested, apparently by the solicitor for the township, that lot 25 be expropriated, and, after public notice of the proposed by-law had been duly published, it was finally passed without objection on the part of the plaintiff, or of any one so far as the records or the evidence disclose.

There is a large public park within two miles of the proposed new park, and it may be conceded that there was no crying demand for an additional park of a small area such as the one in question contains. It may also be taken for granted that if the company had never approached the council as to stopping up the old roadway it might never have occurred to any of the council that a new park was needed. No doubt, too, the stopping-up of the roadway was in the interest of the company. But, admitting all this, how can it be successfully contended that, the roadway being stopped up without objection then or now, the council should not make the best bargain possible for the closed portions of the roadway? I have already pointed out that no attack is made upon the by-law closing the road, but only upon that which provides for the establishment of the park and the expropriation

of the plaintiff's lands, and if the by-law complained of were set aside the result would still leave the roadway closed up so far as these proceedings are concerned.

I have read with care the authorities relied upon by counsel for the plaintiff in their able argument. Those cases are *Pells v. Boswell* (1885), 8 O.R. 680; *In re Vashon and Township of East Hawkesbury* (1879), 30 U.C.C.P. 194; *In re Morton and City of St. Thomas* (1881), 6 A.R. 323; *Re Peck and Town of Galt* (1881), 46 U.C.R. 211; and *Re Waterous and City of Brantford* (1903), 2 O.W.R. 897, and in appeal (1902) 4 O.W.R. 355. These authorities are amply sufficient to support the general proposition that by-laws which are not passed genuinely in the public interest, but palpably in the interest of private individuals, the public having no interest whatever in the subject-matter, cannot stand. But what is or is not in the public interest is a matter to be determined by the municipal council, and what is honestly so determined is not open to review by the Court. See the judgment of Masten, J.A., in *Re Howard and City of Toronto* (1928), 61 O.L.R. 563, at p. 575, referring to *Jones v. Township of Tuckersmith* (1915), 33 O.L.R. 634, 659, and other cases. Moreover, as was pointed out in the same judgment, it is not a valid objection to a by-law that it operates to the special benefit of some private individual, if at the same time it is in the public interest.

In the present instance, the reeve, the deputy reeve, and several, if not all, of the members of the council, gave evidence to the effect that this particular location had been extensively used for many years for bathing purposes by the public, and that it is a most desirable spot for a public park. The evidence of Ezra Whipple, the reeve in the year 1929, is perhaps typical of all the evidence in this connection. He said: "I suggested the proposal because I thought it a good thing for the township. There had been at first a proposal that the land company would give certain lands. Later they found they did not own or could not obtain lot 25. Then they proposed giving us land farther north, which we refused. Our solicitor then suggested that we expropriate lot 25. . . . We were intent on carrying out our agreement with the land company. It was not our intention to help the land company, but we wanted to carry out our agreement. The land company furnished an opening for obtaining

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Garrow, J. what I had thought for some time was a desirable location for  
1930. a park."

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Considerable stress was laid upon the three different proposals in writing submitted to the council, and upon the fact that in one of them the council is requested to expropriate, and the further fact that the company has agreed to bear the cost of expropriation; but, notwithstanding this, I am quite unable to find upon all the evidence that in determining to acquire and lay out the park in question the council was not acting honestly in the public interest.

The further contention that the by-law is in substance a money by-law and should have been submitted to the ratepayers is not entitled to prevail, in my opinion.

Counsel for the defendant contended that the question could not properly arise in this action, which is not brought on behalf of all the ratepayers. Without going into that, it seems to me to be sufficient to say that the by-law on its face does not purport to create a debt; that, if it does, the debt is already provided for by the agreement whereby the company is to bear the expense of expropriation; and that the township treasury has had for years a substantial surplus and has no need to borrow money, although the clerk did say that this year there was a possibility that some funds would have to be borrowed for purposes not connected with the present question.

Upon the whole, I am of the opinion that the action fails and must be dismissed with costs.

The plaintiff appealed from the judgment of GARROW, J.

February 3, 1931. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and FISHER, J.J.A.

*J. H. Rodd*, K.C., for the appellant, argued that the by-law is invalid because the council passed it, not in the interest of the township at large, but at the request and in the interest of the Tecumseh Land Company Ltd., and because the by-law created a debt by the corporation to the owner, the payment of which was not provided for in the estimates for the current year, as required by the Municipal Act, R.S.O. 1927, ch. 233, sec. 297 (1), and the by-law was not passed with the assent of the electors. Reference to *Pells v. Boswell*, 8 O.R. 680; *In re Vashon and Township of East Hawkesbury*, 30 U.C.C.P. 194; *In re Morton and City of*

*St. Thomas*, 6 A.R. 323; *In re Peck and Town of Galt* (1881), 46 U.C.R. 211; *Re Waterous and City of Brantford*, 2 O.W.R. 897, 4 O.W.R. 355.

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*R. S. Robertson*, K.C., for the defendant corporation, respondent, contended that the evidence shewed that the by-law was passed in the public interest. The fact that it particularly benefited some individual or company did not make it invalid, so long as the members of the council were honest in passing it, and there was no evidence of dishonesty. The by-law did not create any debt. Reference to *Re Howard and City of Toronto*, 61 O.L.R. 563; *Re Birge and City of Hamilton* (1922), 52 O.L.R. 63; *Re Chappus and Town of La Salle* (1928), 62 O.L.R. 139.

April 17. RIDDELL, J.A.:—The facts in this case sufficiently appear in the reasons for judgment of the learned trial Judge, Mr. Justice Garrow.

The principles governing such proceedings are authoritatively laid down in the recent case of *Re Howard and City of Toronto*, 61 O.L.R. 563, where the right and duty of the Court is clearly stated in these words, on p. 575, *per* Masten, J.A.:—

“What is or is not in the public interest is a matter to be determined by the municipal council; and what it determines, if, in reaching its conclusion, it acted honestly and within the limit of its powers, is not open to review by the Court.”

Mr. Justice Middleton in the same case, at p. 580, says:—

“A municipal council is a legislative body having a very limited and delegated jurisdiction. Within the limits of its delegated jurisdiction, and subject to the terms of the delegation, its power is plenary and absolute and in no way subject to criticism or investigation by the courts. When the municipal council goes beyond its limited jurisdiction or seeks to ignore conditions precedent to the exercise of the power that has been conferred upon it, it is the duty of the courts to interfere and quash the municipal by-law for illegality. Beyond that the courts cannot go. The question is always one of the right of the municipality to determine the question; the justness or fairness of the action of the council is quite beside the mark. If it is shewn that the municipal councillors have abandoned all honest attempts at legislation and are corruptly seeking by the prostitution of their legislative powers to advance the ends of some member of the

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council or some favoured individual, the courts may also interfere."

Were we not bound by authority, I should consider that the powers of the Court were placed too high, following a tradition of the English Courts and our own based thereon—but I do not enter into that discussion, simply following binding authority.

In considering whether there is a case for the interference of the Court, the maxim *Omnia præsumuntur rite esse acta*, and its special application to public officers, must be borne in mind—as is said in *Earl of Derby v. Bury Improvement Commissioners* (1869), L.R. 4 Ex. 222, at p. 226:—

"In the absence of any proof to the contrary, credit ought to be given to public officers who have acted *primâ facie* within the limits of their authority, for having done so with honesty and discretion."

Notwithstanding all the charges against the good faith of the members of this Council, I am unable to find a scintilla of proof—not to speak of reasonably conclusive evidence—that they have not acted in the best of faith and with an honest desire to do their duty by their Township and constituents.

I would, on the merits, dismiss the appeal.

It remains, however, to consider the effect, if any, of the statutory provisions pressed upon us by counsel for the appellant.

The Municipal Act, R.S.O. 1927, ch. 233, sec. 307, provides for estimates to be prepared; and by sec. 297 provides:—

"(1) Except where otherwise provided by this or any other Act, a corporation shall not incur any debt the payment of which is not provided for in the estimates for the current year, unless a by-law of the council authorising it has been passed with the assent of the electors."

Then it is provided by sec. 342 (1) that "where land is expropriated for the purposes of a corporation . . . the corporation shall make due compensation to the owner. . . ."

The argument is that, upon an expropriation, forthwith a debt is incurred by the corporation to the owner, and this debt is said to come within sec. 295 (1), and should either be provided for in the estimates (sec. 297 (1)) or by a by-law to be submitted to the electors.

The answer seems to be plain—assuming, without deciding, that the corporation does incur a debt by passing an expropri-

ation by-law, this debt is incurred in a manner "otherwise provided by this . . . Act," i.e., by force of the Act itself.

The Act does not limit the power of the corporation—in respect to expropriation sec. 338 (1) is explicit: "The council of every corporation may pass by-laws for acquiring or expropriating any land . . . " There is no limitation to land, compensation for which has been provided in the estimates; nor is there any provision that the compensation must be contained in a by-law to be submitted to the electors.

Any such interpretation as is contended for would result in infinite difficulty and confusion; no Council could possibly take what land it might at a moment's notice require to expropriate to protect the interests of its electors; and we should not give such an interpretation unless absolutely forced to do so, by the language employed. No such necessity exists in this case; and I find no illegality in the by-law, even though nothing appears regarding compensation in the estimates, and no money by-law is to be submitted.

I would dismiss the appeal with costs.

I think I should add that if the appeal were allowed, no costs of the appeal should be given to the appellant; the material furnished for the use of the Court is imperfect and not such as the Rules require—more care should be taken in regard to such material; and if the appellant should be deprived of his costs for this reason, he has no right to complain.

LATCHFORD, C.J., and FISHER, J.A., agreed with RIDDELL, J.A.

MASTEN, J.A.:—This was an appeal by the plaintiff from a judgment of Garrow, J., dated the 15th August, 1930, dismissing the plaintiff's action with costs.

The appeal is based upon two grounds: first, that the by-law in question is invalid because, as alleged, the council, in passing it, was not using its power in good faith in the interest of the public, but simply to subserve the interests of private persons; and, secondly, because the by-law has the effect of incurring a debt the payment of which is not provided for in the estimates for the current year and because the by-law has not been passed with the assent of the electors.

The facts are fully stated in the judgment of Garrow, J., and need not be here repeated.

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I am of the opinion that the appeal fails.

With regard to the first ground, it is not a valid objection to a by-law that it operates to the special benefit of some private individual if at the same time it is in the public interest: *In re Inglis and City of Toronto* (1905), 9 O.L.R. 562 (*per* Anglin, J., at p. 568); *Jones v. Township of Tuckersmith*, 33 O.L.R. 634 (*per* Meredith, C.J.O., at p. 657); *United Buildings Corporation Ltd. v. City of Vancouver*, [1915] A.C. 345.

While it is entirely probable in the present case that the expropriation proposed by the by-law operates to the advantage of the Tecumseh Land Company Ltd., yet it appears to be perfectly plain upon the evidence that the by-law is in the public interest, in that it preserves to the inhabitants of the township a convenient place for bathing and making use of the desirable sand-beach which there exists on the shores of Lake Erie.

With regard to the second objection, I am unable to see that the by-law creates any debt. The by-law providing for the expropriation of certain lands does not bind the corporation to take the lands or to pay for them, for under the provisions of the statute the corporation may withdraw after an award fixing the value has been made.

For these reasons I would dismiss the appeal with costs.

*Appeal dismissed.*

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[APPELLATE DIVISION.]

1931.

ROYAL BANK OF CANADA v. McNAUGHTON.

April 17.

*Promissory Note—Liability of Endorser—Note Discounted and Held by Bank—Waiver of Notice of Non-payment and Protest—Whether Waiver of Non-presentment for Payment—Presentment not Proved at Trial—Funds at Credit of one Maker in same Bank at a Date after Maturity—Whether Bank's Duty to Charge Note to Account—Proof by Affidavit that Co-maker had no Funds to his Credit at Maturity—Rule 257—Division Courts Act, sec. 217.*

A joint and several promissory note made by J. and his wife and endorsed by the defendant was discounted at a branch of the plaintiff bank and was held by that branch at maturity. The note bore on its back a special waiver, signed by the defendant, reading: "For value received I guarantee the payment of this note and hereby waive notice of non-payment and protest thereof:"—

*Held*, in an action brought upon the note in a Division Court, that the waiver dispensed with notice of dishonour and with protest but not with presentment for payment at maturity.

*Keith v. Burke* (1885), C. & E. 551, and *Théberge v. Banque Canadienne Nationale* (1929), Q.R. 47 K.B. 81, followed.

The decision in *Rat Portage Lumber Co. v. Margulius* (1914), 15 D.L.R. 577, 16 D.L.R. 477, is based on the assumption that the note there in question had been in fact dishonoured—i.e., dishonoured according to its tenor.

- (2) It was not proved that the note was duly presented for payment. Being held by the branch of the bank at which it was made payable, formal presentment was dispensed with if in fact there were no funds at the bank available for payment of it at maturity. It was proved at the trial that Z.'s wife had an account at that branch, which, on the date when the note matured, was overdrawn, and that would be sufficient to dispense with presentment if she were the sole maker of the note. The plaintiff bank had not proved that Z. had no funds in the bank when the note matured, and the onus was upon the bank. It would not be proper to dismiss the bank's action because of its failure to prove something which was taken for granted by both sides; and as, under Rule 257 (made applicable by sec. 217 of the Division Courts Act to Division Court actions), failure to prove some fact material to a case may afterwards be proved as the Judge may direct, the plaintiff bank was permitted to prove by an affidavit that, at the date when the note matured, Z. had no funds to his credit in the bank.
- (3) It was not the duty of the bank to charge the note against the wife's account in the bank when the account was in credit some time after the note's maturity.

AN appeal by the defendant from the judgment of LIVINGSTONE, Co. C.J., in an action in the Third Division Court of the County of Welland, in favour of the plaintiff bank for the recovery of \$249.35, the amount of a joint and several promissory note made by one Zimmerman and his wife and endorsed by the defendant. On the back of the note was a special waiver signed by the defendant.

March 31. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, JJ.A.

*H. A. Rose*, for the appellant, argued that the waiver merely dispensed with notice of dishonour and with protest, but not with presentment for payment at maturity. There was no proof of presentment for payment. The bank should have charged the note against moneys in the account of Susan E. Zimmerman, after the note became due, when there were sufficient funds to her credit. Reference to *Nightingale v. City Bank of Montreal* (1876), 26 U.C.C.P. 74.

*T. J. Darby*, for the plaintiff bank, respondent, contended that waiver of presentment for payment was included by implication in the waiver of notice of dishonour and of protest. The bank was under no obligation to watch Mrs. Zimmerman's account, and,

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when it became large enough, to charge up the note against it, for the protection of the endorser.

April 17. The judgment of the Court was read by ORDE, J.A.:—The action is to recover against the defendant as endorser of a joint and several promissory note made by one Zimmerman and his wife. The note was payable at the Royal Bank of Canada at Bridgeburg, and was discounted by that branch of the plaintiff bank and was held by it at maturity.

The note bears on its back a special waiver signed by the defendant in the following words: "For value received I guarantee the payment of this note and hereby waive notice of non-payment and protest thereof."

The defendant now appeals from the judgment of the learned Division Court Judge.

Several grounds of appeal were disposed of upon the argument, but there were three which required further consideration, namely:—

1. That the waiver merely dispensed with notice of dishonour and with protest but not with presentment for payment at maturity.

2. That it was not proved at the trial that the note had been duly presented for payment.

3. That it was the duty of the bank to have charged the note against Mrs. Zimmerman's account when the account was in credit some time after the note's maturity.

Any judicial authority as to whether or not waiver of notice of dishonour includes by implication a waiver of presentment for payment is surprisingly meagre. Some of the text-writers suggest that the question is doubtful. For example, Chalmers on Bills of Exchange, 9th ed., p. 194, says: "A waiver of notice of dishonour may not include a waiver of presentment for payment;" and Dean Falconbridge, in his work on Banking and Bills of Exchange, 3rd ed., p. 758, quotes Chalmers to the same effect. The only reported case seems to be *Keith v. Burke* (1885), C. & E. 551. There Baron Pollock, dealing with this very question, says at p. 553: "Notice of non-payment means notice of dishonour, and the concluding words restrict the operation of the waiver to the effect of not giving that notice. I cannot import the words 'and of non-presentment' into the document." As a judicial ruling this is clear and I can see no reason for differing from it.

When it is remembered that presentment for payment at maturity and notice of dishonour thereafter are two separate and distinct acts which the holder must perform to retain an endorser's liability, it is difficult to see why the waiver of the later of the two should exonerate the holder from his duty to perform the earlier. Indeed the waiver itself suggests that there must first be default on the part of the maker, otherwise no notice of dishonour would be necessary. And default in payment means default according to the tenor of the note, that is, failure to pay at the place fixed for payment, and not mere failure by the maker to come in to the holder and pay. Notice of dishonour might conceivably be waived by an endorser because he was satisfied that funds would be available at the place fixed for payment at the maturity of the note. If he is willing to waive notice of the default, he is surely nevertheless entitled to the protection which the law requiring the holder to present for payment affords him. If, for example, funds were available to pay the note at the place fixed for payment when it matured, and, by reason of the holder's failure to present it promptly, the opportunity is allowed to slip and the funds are withdrawn, the endorser must suffer.

In my opinion there must be a distinct and unequivocal waiver of presentment to excuse the holder's neglect to present for payment, and a waiver of notice of dishonour is not enough.

Nor can waiver of protest include waiver of presentment. Just why upon an inland bill it should be thought necessary to obtain waiver of protest from an endorser, I do not quite understand. Protesting a bill for non-payment is merely a means of authenticating the due performance of the acts required to hold the endorser. The holder is under no obligation to protest a bill at all, and he may present the bill and give notice of dishonour without the intervention of a notary.

It was held in Manitoba that waiver of protest includes waiver of notice of dishonour: *Rat Portage Lumber Co. v. Margulius* (1914), 15 D.L.R. 577, affirmed on appeal, 16 D.L.R. 477. This view may well be supported on the ground that the endorser intended to waive the performance of some duty required of the holder by law, and, as he was not bound to protest, the waiver must extend at least to notice of dishonour. The learned trial Judge in that case thus puts it (15 D.L.R. at p. 578): "The waiver of protest, I take it, means a waiver of all formalities connected with

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the dishonour of the note." This reasoning must, of course, be based on the assumption that the note has been in fact dishonoured, and this, as I have already said, must mean dishonoured according to the tenor of the note.

Waiver of protest does not, in my opinion, dispense with presentment for payment. There are four recent Quebec decisions to the same effect as the above, namely: *Beaudoin v. Bourassa* (1926), 32 Rev. Leg. 243; *Nadeau v. Vachon* (1926), 29 Que. P.R. 185; *Pageau v. Lemoine* (1929), Q.R. 68 S.C. 21; and *Théberge v. Banque Canadienne Nationale* (1929), Q.R. 47 K.B. 81, the last a judgment of the full Court of King's Bench (appeal side).

Then as to the next point: Was it proved that the note was duly presented for payment? The note was held by the Bridgeburg branch of the plaintiff bank, at which branch it was payable. It is not suggested that there was any formal presentment, but it is well settled that, in these circumstances, formal presentment is dispensed with if in fact there are no funds at the bank available for payment of the note at its maturity. It was proved at the trial that Mrs. Zimmerman, one of the makers of the note, had an account at the Bridgeburg branch which, on the date when the note matured, was overdrawn. That would be quite sufficient to dispense with presentment if she were the sole maker of the note. There was no evidence as to whether or not Benjamin Zimmerman had an account with the bank. He was called as a witness, and his evidence would indicate that at the date of the trial he had no means with which to satisfy the note, other than certain property which he and his wife had mortgaged to the bank as collateral security for their indebtedness. It is rather to be inferred from the evidence as a whole that Zimmerman had no funds in the bank when the note matured, but it is impossible to say that the bank has proved it, and I think the burden lies upon the bank to prove it. It would not be proper, in the circumstances, however, to dismiss the bank's action because of its failure to prove as a fact something which the course of the trial indicated was taken for granted by both sides. Under Rule 257 (which, by virtue of sec. 217 of the Division Courts Act, R.S.O. 1927, ch. 95, is applicable to Division Court actions) failure to prove some fact material to a case may afterwards be proved as the Judge may direct. It would suffice now to prove the fact by affidavit, and

the plaintiff bank ought to be permitted to verify, by means of an affidavit, the fact that on the 16th June, 1927, the date when the note matured, Benjamin Zimmerman had no funds to his credit at the Bridgeburg branch of the bank available for the payment of the note.

As to the third point, whatever right a bank may have to charge up an overdue bill or note against its customer, as to which I say nothing, there is no principle I know of which requires the bank to do so for the protection of an endorser. If at the maturity of the instrument the bank has done all that the law requires of it to bind the endorser, then the respective rights and obligations of the parties are fixed. Moneys which happen at a later date to be in the bank at the credit of the maker of the note which the bank *may*, if it chooses, resort to for payment, cannot be regarded as a security for the note which the bank *must* hold for the benefit of the surety, that is the endorser.

The defendant fails on all three grounds, and the appeal ought to be dismissed with costs, but only upon the plaintiff bank filing with the Registrar of this Court the affidavit above mentioned. If that affidavit is not filed within three weeks from the delivery of this judgment, the appeal should be allowed and the action dismissed with costs here and below.

*Judgment accordingly.*

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[APPELLATE DIVISION.]

REX V. NEEDHAM.

1931.

April 17.

*Police Magistrate—Conviction for Offence against Liquor Control Act (Ontario), R.S.O. 1927, ch. 257, sec. 91 (b)—Information Charging Offence against sec. 72 (2)—Amendment without Notice to or Knowledge of Defendant—Powers of Magistrate—Sec. 118—Mis-carriage of Justice—Conviction Quashed.*

The defendant was charged before a police magistrate with the offence of unlawfully selling or keeping intoxicating liquor for sale contrary to sec. 72 (2) of the Liquor Control Act; and was tried by the magistrate on that charge only. About a week later, the magistrate, without the knowledge of or notice to the defendant, amended the information, under power assumed to be conferred by sec. 118 of the Act, and convicted the defendant of keeping liquor in a hotel when not a *bonâ fide* guest, contrary to sec. 91 (b):—

*Held*, that the defendant had been found guilty of an offence of which he had not to his knowledge been accused, and that his conviction was

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1931. properly quashed on appeal to a County Court Judge, though not for the reasons assigned by that Judge.
- REX *Semble*, a sworn information should never be amended unless re-sworn.
- NEEDHAM. *Per* MASTEN and ORDE, J.J.A., the soundness of the judgment in *Rex v. Bosworth* (1930), 38 O.W.N. 490, 54 Can. Crim. Cas. 231, doubted.

AN appeal by the Crown, by direction of the Attorney-General for Ontario, under sec. 139 of the Liquor Control Act, R.S.O. 1927, ch. 257, from an order of the Judge of the County Court of the County of Renfrew (MULCAHY, Co. C.J.), quashing the conviction of the defendant by a police magistrate for keeping intoxicating liquor in a hotel when not a *bonâ fide* guest, contrary to sec. 91(b) of the Act.

April 1. The appeal was heard by LATCHFORD, C.J., MASTEN and ORDE, J.J.A., and McEVOR, J.

*W. B. Common*, for the appellant, argued that, although the evidence did not shew the *locus in quo*, the information and the conviction did, and all three should be read together: *Regina v. McGregor* (1895), 26 O.R. 115; *Rex v. Reedy* (1908), 18 O.L.R. 1; *Rex v. James* (1915), 25 D.L.R. 476; *Rex v. Canadian Pacific Railway Co.* (1908), 14 Can. Crim. Cas. 1; *Rex v. Legge* (1922), 36 Can. Crim. Cas. 243; *Ex p. Fitchitt* (1929), 51 Can. Crim. Cas. 229; *Rex v. Bosworth* (1930), 38 O.W.N. 490. As the conviction was incomplete, the learned Judge should have dismissed the appeal to him, instead of allowing it.

*M. Doctor*, for the defendant, respondent, argued that, as the depositions did not shew where the *locus in quo* was, a conviction could not rightly be made.

April 17. LATCHFORD, C.J.:—This appeal is under sec. 139 of the Liquor Control Act, R.S.O. 1927, ch. 257, and purports to be from a judgment or order of his Honour John J. Mulcahy, Judge of the County Court of the County of Renfrew, dated the 11th February, 1931, allowing an appeal by M. J. Needham from a conviction under sec. 91(b) of the Act, made by the Police Magistrate for the Town of Pembroke, on the 12th January, 1931.

From the reasons for judgment of the learned County Court Judge it would appear that he considered that there was no evidence to shew that the Leland Hotel, which was operated by Needham, was within the jurisdiction of the police magistrate, and that there was really no conviction in the proper sense of the word. Such, however, as it was, he thought should be quashed.

If any order was issued conformable to the reasons stated, it is not to be found among the documents produced on this appeal. The omission was not called to the attention of the Court during the argument of the appeal. This Court has on more than one occasion refused to consider an appeal where no formal order or judgment was before it, but would doubtless have enlarged this matter if the absence of the order had been noticed. I would suggest that in order to complete the record the order be issued which should have been issued and that a copy be filed with the registrar. I am assuming that when it is filed nothing more will appear in it than that the conviction was quashed, and I propose to treat the appeal as if the order was before the Court.

Without expressing any approval of the reasons stated by the learned Judge for quashing the conviction, I think that it was rightly quashed. I base my opinion on the simple fact that Needham was convicted of an offence of which he was not accused and for which he was not tried.

The material before the Court is defective in not stating the date of the trial. Further, the copy of the information is incorrect. This is, perhaps, excusable, inasmuch as nothing but a photographic copy could properly represent the mangled original. As sworn to originally by William McPhee, the Pembroke chief of police, before the police magistrate on the 24th December, 1930, the information charged that Needham, at the town of Pembroke, on the 24th day of December, 1930, "did unlawfully sell or keep liquor for sale contrary to section 72(2) of the Liquor Control Act." Section 72(2) of the Act provides that

"No person shall, except with the permission of the Board . . . have or keep any liquor, other than native wine, within the Province which has not been purchased from a Government vendor or from a physician as provided by section 56."

The information as sworn to charged a definite offence under sec. 72(2), that "Needham did unlawfully sell or keep liquor for sale."

The learned magistrate certifies that "the notes of evidence were duly taken down in shorthand, under my personal direction and superintendence, by the stenographer Hazel Lisk and were afterwards typewritten out by her and signed by her and I."

After a proper heading, they begin by stating the charge against Needham to be a violation of sec. 72(2) of the Act. It is

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on that charge, and on that charge only, that Needham was tried.

At the close of the evidence on behalf of the prosecution the report states that "counsel for the accused moved for dismissal on the ground that there was no evidence to convict. The information was not correct, as subsec. 2 of sec. 72 of the Act did not read the same as the information. After listening to argument by counsel for the Crown and counsel for the accused, I" (that is the magistrate) "refused to dismiss charge and amended information under powers conferred on me by section 118 of the Act and decided accused would have to go on his defence."

Notwithstanding this declaration that the magistrate then "amended information," it will appear later that no amendment was in fact made at the time, nor until about a week after Needham had been tried for violation of sec. 72(2).

At the conclusion of the trial of Needham for violation of that section of the Act, and he was not tried for violating any other, the extended notes, certified to have been "taken down under the personal direction and superintendence" of the magistrate, state that "the magistrate reserved his decision, saying he was satisfied there had been a breach of the Act, but that he would go over the notes of evidence *and decide whether or not he would amend charge*, and render his decision on Monday, January 12th, 1931, at 2 p.m., at police court here." (The italics are mine).

The judgment rendered on the 12th January makes it still more apparent that the amendment was after the trial, and that it was prompted by a feeling that Needham had been guilty of some offence prohibited by the Act. The magistrate said in rendering judgment:—

"Since looking over the whole evidence, I am satisfied that there has been an offence under the Act. To convict accused as charged of selling or keeping for sale would depend on inferences which I have power to draw according to the Act. This is discretionary with the magistrate, and I have decided, instead of convicting as charged, to amend the information under section 118 to correspond and register a conviction under section 91(b). I therefore find the accused guilty and sentence him to pay a fine of \$800 and costs of \$8.50 or three months in gaol if fine is not paid."

In other words, "I have a discretion to infer from the evidence that Needham is guilty of the charge against him, but I am not doing that. Instead, under the powers conferred by sec. 118, I

have amended the information so as to charge him with the offence specified in sec. 91(b), and I convict him of that offence.”

In fact there was not a scintilla of evidence to sustain the charge as originally laid.

In the circumstances neither Needham nor his counsel had or could have any knowledge whatever of the new charge in the amended information. The accused had not and could not have been asked to plead to it and was not tried upon it. Yet it is upon the new charge, of which he had no knowledge whatever, that he was fined \$800 and costs, as an alternative to three months' imprisonment.

Proof of the charge laid having failed, the magistrate, in his anxiety to convict Needham of some offence against the Act, undertook in the interval between the trial and the 12th January to amend or alter the information by inserting on its face a new charge.

By sec. 122 an information is required to be in writing. It need not be verified by oath or affirmation. However, the information against Needham was verified by the oath of Chief of Police McPhee. To insert in a sworn information a material change, or matter of substance, such as the new charge of violating sec. 91(1) (b) of the Act, and not to have the altered document re-sworn, is a proceeding rarely, if ever, justifiable. The amendment to a sworn information considered by Street, J., in *Rex v. Lewis* (1903), 5 O.L.R. 509, did not alter, but simply rendered more clear, the original charge. In that case the amended information was read over to the accused, and the trial proceeded without protest or objection on his part. Such a change should never, in my opinion, be made unless the information required to be in writing is re-sworn. In this case the effect is to make the deponent falsely appear to swear what he had not sworn—that Needham “did keep or have liquor in a room in the Leland Hotel without being a *bonâ fide* guest of such hotel, contrary to Liquor Control Act under section 91(2).”

It may be noted in passing that there is no part of sec. 91 numbered precisely as the alteration states. What was intended to be mentioned, as the subject-matter indicates, is sec. 91(b).

Section 118 empowers the Justice to amend or alter any information “at any time before judgment.” These words, however, do not, in my opinion, authorise such a change to be made after a trial. This seems quite plain from the concluding words of the

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section. They provide that, if it should appear that the defendant had been materially misled by such amendment, "the Justice shall thereupon adjourn the hearing of the case to some future day." The defendant may waive adjournment, but manifestly he cannot waive an adjournment except during the trial. Again, how can it be known whether he is misled or not, if he is not made aware of the amendment? The addition, subsequent to the hearing, of a new charge to that originally made in the indictment was not such an amendment as, in my opinion, sec. 118 authorises, yet that is what was admittedly done.

On elementary principles the conviction should not be allowed to stand. No man can be convicted of an offence except after trial according to law. Here Needham was tried upon a specific charge laid under sec. 72(2) of the Liquor Control Act. After his trial was ended judgment was reserved. Upon consideration the magistrate decided not to convict the accused of the offence charged, that is, the accused was found not guilty of the particular infraction of the Act with which he was charged and on which only he was tried. Then, in excess of any power contained in sec. 118 here invoked as justifying his conduct, the magistrate, of his own motion, in Needham's absence, and without calling upon him or his counsel for plea or defence—indeed, it appears, without their knowledge—alters the information by introducing into it a materially different charge, and, *mirabile dictu*, finds Needham guilty of what he had not to his knowledge been accused.

It is unnecessary to cite cases regarding so obvious a miscarriage of justice. I may, however, mention the recent decision of the First Divisional Court in *Rex v. Marcus and Richmond* (1931), *ante* 164.

The appeal should be dismissed.

MASTEN, J.A.:—In this appeal I concur in the conclusion reached by my Lord and by my brother Orde; also in the reasons stated by them, to which I cannot usefully add.

ORDE, J.A.:—I agree with the judgment of my Lord the Chief Justice that this appeal must be dismissed.

In upholding the judgment of the learned County Court Judge quashing the conviction, I wish to make it clear that I do so solely upon the ground stated by the Chief Justice, and not upon the grounds relied on by the County Court Judge.

These grounds it is not necessary to discuss at length. I very much doubt the soundness of the ruling, based upon the judgment of another County Court Judge in *Rex v. Bosworth*, 38 O.W.N. 490, 54 Can. Crim. Cas. 231, that the absence of a formal conviction in the record justifies the quashing of the conviction. The record ought, of course, to be completed, and the learned County Court Judge should have so directed before disposing of the appeal. If the absence of the formal conviction is taken as evidence that there was no conviction at all, then there was nothing to quash; and, if the accused was in gaol, then some other procedure than appealing, perhaps a proceeding by way of *habeas corpus*, would seem to be the proper course.

If the absence of a formal conviction rendered the record so incomplete as to deprive the County Court Judge of jurisdiction, then he had no power to reverse the decision of the magistrate, and ought either to have directed that the record be made complete—the proper course—or failing that to have quashed the appeal.

It was clearly improper for the magistrate, after trying the accused upon the charge laid and finding that the evidence did not justify his conviction upon it, to amend the charge and then convict for an offence which the accused had had no opportunity of meeting. This is, in words analogous to those in the well known song of the Mikado, “making the conviction fit the crime” with a vengeance.

McEvoy, J.:—I agree that the appeal should be dismissed.

*Appeal dismissed.*

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[WRIGHT, J.]

WEIR V. TOWNSHIP OF TURNBERRY.

1931.

*Highway—Nonrepair—Obstruction—Injury to Passenger in Motor-car—Injury Caused by Obstruction—Notice of Injury not Given in Time—Municipal Act, sec. 469(4)—Reasonable Excuse—Delay after Time Expired—Effect of.*

April 18.

When travelling in a motor-car upon one of the defendant corporation's highways, the plaintiff was injured by reason of the car striking an obstruction (a stone) in the highway and overturning. He brought this action for damages for his injuries:—

*Held*, upon conflicting evidence, that the highway was in a state of nonrepair, and that the accident resulted from that nonrepair.

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The township authorities had ample notice of the existence of the obstruction, and knew of the accident on the next day after it occurred. On that day, the 7th October, 1930, the plaintiff was taken to a hospital, and remained there until the 20th October, when he returned to his home. On the 22nd October, written notice of the accident and his injury was given to the township authorities. During the 10 days following the accident he was incapacitated by reason of his physical and mental condition, as the trial Judge found, from giving the notice required by sec. 469 (4) of the Municipal Act:—

*Held*, that, there being no evidence that the defendant corporation was prejudiced by the failure of the plaintiff to give notice within the time required by the statute, the Court should be astute in finding reasonable excuse.

*Howard v. South Vancouver*, [1924] 4 D.L.R. 257, and dictum of Anglin, J., in *O'Connor v. City of Hamilton* (1904), 8 O.L.R. 391, 396, approved.

What occurs after the expiry of the time has no effect upon the question of reasonable excuse.

*Held*, therefore, that the plaintiff had a reasonable excuse for failure to give the notice within the time required; and was entitled to recover damages against the corporation.

ACTION for damages for injury caused to the plaintiff, upon a highway of the defendant township corporation, by reason of the nonrepair of the highway, as the plaintiff alleged, or by reason of the negligence of the defendant Halliday, in whose motor-car the plaintiff was a passenger at the time of the accident, in not having proper control of the car.

The action was tried before WRIGHT, J., without a jury, at Goderich.

*O. E. Klein*, K.C., for the plaintiff.

*R. H. Greer*, K.C., for the defendant Halliday.

*C. Grant* and *E. W. Rush*, for the defendant the Corporation of the Township of Turnberry.

April 18. WRIGHT, J.:—In this action the plaintiff claims damages for injuries arising out of an accident which happened on a highway of the defendant corporation on the 6th October, 1930, about midnight.

The evidence established that the plaintiff and his wife were passengers in an automobile driven by the defendant Halliday on a highway between the 10th and 11th concessions of the Township of Turnberry, when the automobile struck an obstruction in the highway, and the driver lost control of the car, which overturned, resulting in severe injuries to the plaintiff.

The plaintiff bases his claim against the defendant corporation on the ground that the highway was out of repair and in

the alternative against the defendant Halliday for negligence in not having proper control of his automobile.

No evidence was adduced shewing any negligence whatever on the part of the defendant Halliday, and at the close of the plaintiff's case I dismissed the action as against that defendant.

On the question as to nonrepair of the highway widely divergent evidence was given by the different witnesses called on behalf of the plaintiff and the defendant corporation; but, after due consideration, I have come to the conclusion that the highway was in a state of nonrepair and that the accident resulted from such nonrepair.

The nonrepair consisted in leaving a stone on the gravelled portion of the highway, which at the point of the accident was about 11 feet in width. From the evidence it would appear that there were two well-defined wheel-marks in which vehicles generally travelled. The stone in question was some few inches from the north track, but was well within the travelled portion of the road. According to Mr. James, a civil engineer who was called for the defendant corporation, the stone was apparently placed there in building the road.

The witnesses differed as to the height of the stone, but I accept the evidence of the witnesses who measured the stone shortly after the accident. Their evidence is to the effect that the stone projected about 5 inches above the level of the surrounding ground. The witnesses for the defence made their observations some time after the accident, and some of them quite recently, when there had been considerable change in the surface of the road at the place in question.

I accept the evidence of the plaintiff and his wife as to the nature of the accident. They both testified that the car was proceeding at a reasonable rate of speed, that suddenly a severe jar or jolt was felt, and shortly afterwards the car overturned.

When the car was examined after the accident, it was found that the left front wheel had collapsed, the spokes and axle being entirely separated from the rim. The rim and the tire were produced as exhibits in Court and bore out this statement.

There was evidence given by a witness, William Marshall, that shortly after the accident he found slivers from the spokes of the front wheel of the automobile at or near the stone. This witness, as well as others, testified that he traced the path of the automobile from the stone to where the automobile was found

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Wright, J. overturned in the ditch, and, according to their evidence, which I  
1931. accept, the car had come in direct contact with the stone.

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TURNBERRY. Some witnesses were called by the defendant who testified to  
the fact that they had heard a sound as if a tire had collapsed  
before the car had reached the stone; but, while giving them due  
credit for honesty, I think these witnesses were mistaken, and  
I find that the collapse of the tire occurred after the impact  
between the stone and the car.

The township officials had full notice of the existence of the  
stone at the place in question. A witness testified that it had  
been in the same position for at least 10 years, and there was  
evidence to the effect that the road patrolman had attempted to  
remove it some three years before the accident. This patrolman  
was called and admitted that he knew the stone had been there for  
some 16 years, so that the township had ample notice of the exist-  
ence of this obstruction, even if such notice were necessary.

The evidence established also that the township authorities  
knew of the accident the day following it. This is important in  
view of one branch of the defence.

A feeble attempt was made at the trial to shew that the driver  
of the car had been drinking, and that certain empty bottles  
which had contained liquor were found in or near the scene of  
the accident. There was no credible evidence whatever that any  
of the occupants of the car had been indulging in intoxicating  
liquors and the attempt to establish such a defence signally  
failed.

That the plaintiff was seriously injured was abundantly proven.  
The day following the accident he was taken to Wingham and  
had his injuries X-rayed, and the same day he was, on the  
advice of his physician, taken to the hospital at London for  
treatment by Dr. Peever, a specialist in surgery. He remained  
at that hospital until the 20th October, when he returned home.  
Written notice pursuant to the Municipal Act was given to the  
authorities of the township on the 22nd October.

The defendant corporation relied very strongly on the failure  
of the plaintiff to give the notice of the accident within 10 days,  
as required by sec. 469 (4) of the Municipal Act.

In reply to this the plaintiff contends that he had reasonable  
excuse for failure to give such notice within the time prescribed.

The evidence established, as already stated, that the plaintiff

was severely injured and that he was taken to the hospital on the day after the accident, where he remained until the 20th October, which was after the time prescribed for giving the notice. During that time, according to his evidence, he was suffering intense pain from his injuries and gave no attention to his business affairs or anything except his own suffering.

While he may have exaggerated his evidence in that respect somewhat, yet I find the fact to be that he undoubtedly was suffering great pain and was not in a condition physically to attend to any business affairs.

Counsel for the defendant corporation relied strongly on the decision in *Bissell v. Township of Rochester* (1930), 65 O.L.R. 310, as supporting his contention that no reasonable excuse was shewn by the plaintiff for failure to give the notice. The facts in that case are clearly distinguishable from those in the present. In that case the plaintiff remained in the hospital for only 5 days after the accident, when he returned to his home and was able to walk about. Under these circumstances I held that there was no reason why the plaintiff could not have within the 10 days given the required notice.

In the present case, as already stated, the plaintiff was confined in the hospital at London for at least 13 days after the accident, and during the 10 days immediately following the accident he was incapacitated by reason of his physical and mental condition from giving the notice.

There was not the slightest evidence to shew that the defendant municipality was in any way prejudiced by the failure of the plaintiff to give the notice within the time required by the statute; and, adopting the holding in the case of *Howard v. South Vancouver*, [1924] 4 D.L.R. 257, the Court ought under such circumstances to be astute in finding reasonable excuse. To the like effect is the dictum of Anglin, J., now Chief Justice of the Supreme Court of Canada, in *O'Connor v. City of Hamilton* (1904), 8 O.L.R. 391, at p. 396.

In my view the cases that most nearly resemble the present in its various aspects are *City of Kingston v. Drennan* (1897), 27 Can. S.C.R. 46, and *Morrison v. City of Toronto* (1906), 12 O.L.R. 333, also *Anderson v. City of Toronto* (1908), 15 O.L.R. 643.

In the two cases first cited the injured party was confined in

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Wright, J. the hospital during the time the notice should have been given  
1931. and was physically incapacitated from giving the required notice.

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TOWNSHIP Under all the circumstances I think the plaintiff has estab-  
OF lished reasonable excuse for failure to give the notice within the  
TURNBERRY. time prescribed.

At the trial I entertained some doubt as to whether or not the fact that on the 20th the plaintiff left the hospital and on the 21st was at home, but did not take any steps to notify the defendant township, should tell against him.

Upon further consideration I do not think this affects the case.

The time stipulated for the giving of the notice had then expired, and I do not think what occurs after the expiry of the time has any effect upon the question of reasonable excuse.

In my view, the reasonable excuse is to be determined upon the facts and circumstances existing during the time within which notice should have been given. Even failure to give notice at all might well be excused, and it is doubtful if the giving of a notice after the expiration of the 10 days has any effect whatever.

I find, therefore, that the accident was caused by the non-repair of the highway; that the plaintiff had a reasonable excuse for failure to give the notice within the time required; and therefore that the plaintiff is entitled to recover damages against the defendant township corporation.

The principal injury to the plaintiff consisted in the fracture of his right arm, and the evidence of the medical witnesses discloses that the fracture was one of an unusual nature. Although upwards of 6 months has elapsed since the accident, yet there has been no union of the bones of the arm, and, according to the evidence of Dr. Peever, it is somewhat doubtful whether union will ever result, although the probabilities are that it will.

In any aspect of the case, the plaintiff's injuries are of a severe nature. Since the accident he has been unable to work and has paid for the board and wages of men in the neighbourhood of \$200. His disbursements for medical attendance and hospital charges and travelling expenses are in the neighbourhood of \$500. I think a fair allowance to the plaintiff for his damages would be the sum of \$1,750, and there will be judgment for that amount with costs as against the defendant township corporation.

The action will be dismissed against the defendant Halliday with costs.

## [APPELLATE DIVISION.]

STUART &amp; SINCLAIR LTD. v. BILTMORE PARK ESTATES LTD.

1931.

April 20.

*Mechanics' Liens—Lien on Estate of Lessee of Land—Claim of Lien upon Estate of Landlord—Knowledge of or Consent to Work being Done not Sufficient to Charge Lessor's Estate—Absence of Privity—"Owner"—Mechanics' Lien Act.*

The defendant Park company, the owner of a parcel of land, leased a portion of it to the club for a long term of years. It was a term of the lease that the club should erect a club-house upon the part leased, and the club accordingly entered into a contract with the plaintiff company for the erection of the building. The Park company had knowledge of the making of the contract, but was in no sense a party or privy thereto. The plaintiff company (the appellant) could not claim a lien as against the estate or interest of the landlord under sec. 7 of the Mechanics' Lien Act, R.S.O. 1927, ch. 173, no notice having been given as required by that Act; but the claim was put forward that, although the building was erected under a contract with the tenant, the landlord could be regarded as an "owner" within the definition of that term in the Act, and so a lien could under sec. 5 of the Act be claimed upon the landlord's estate and interest. It was said that the work was done on its behalf and with its consent and privity:—

*Held*, that there could not be a lien unless there was something in the nature of direct dealing between the contractor and the person whose interest was sought to be charged—mere knowledge of, or mere consent to, the work being done, was not sufficient; and the plaintiff company's appeal should be dismissed.

*Marshall Brick Co. v. York Farmers Colonization Co.* (1917), 54 Can. S.C.R. 569, followed.

*Per* MAGEE, J.A. (dissenting):—The facts distinguished this case from the *Marshall* case, and the appeal should be allowed.

AN appeal by plaintiff company from the judgment of LIVINGSTONE, Co. C.J., in a mechanic's lien action, declaring the appellant company entitled to a lien for \$28,000 upon the leasehold interest of the defendant the Canada Biltmore Club Ltd., and dismissing the action as against the defendant Biltmore Park Estates Ltd., the lessor, and further declaring the priority of the defendant mortgagees over the lien allowed.

February 24 and 25. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*R. R. Evans*, for the appellant company, contended that, although the contract was made with the lessee, the appellant company was entitled to hold the owner liable by reason of its knowledge and assent. The lease contains a term requiring the lessee to build, and provides that upon any default the building shall become the property of the lessor, and that in any event it shall become the property of the lessor at the termination of the lease

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in 40 years. Under the Mechanics' Lien Act, R.S.O. 1927, ch. 173, in order to bind the owner of land the work must be done (a) on his request, (b) on his credit, on his behalf, or with his privity or consent, and (c) for his benefit. The document executed and the surrounding circumstances amount to a request by the owner of the freehold, which request was communicated to the plaintiff contractor. Here the work was done on the credit of the owner and with its privity and consent. There is no doubt that the owner of the land derived the benefit of the work done. Reference to *Orr v. Robertson* (1915), 34 O.L.R. 147; *Cut-Rate Plate Glass Co. v. Solodinski* (1915), 34 O.L.R. 604; *Marshall Brick Co. v. Irving* (1916), 35 O.L.R. 542.

*L. B. Spencer*, K.C., for the defendant Biltmore Park Estates Ltd., respondent, argued that, conceding that the landlord was anxious to have the club-house built, the appellant could nevertheless not enforce the agreement because the respondent was not a party to it. There was no privity, although there was knowledge: *Sanderson Percy & Co. Ltd. v. Foster* (1923), 53 O.L.R. 519. The case comes directly within the principles laid down in the *Marshall* case, *supra*.

April 20. MIDDLETON, J.A.:—An appeal by the plaintiffs from a judgment pronounced by the Judge of the County Court of the County of Welland, in proceedings under the Mechanics' Lien Act, on the 18th June, 1930, declaring that the plaintiffs were entitled to a lien for some \$28,000 upon the leasehold interest of the Canada Biltmore Club Ltd., and dismissing the action against the defendant Biltmore Park Estates Ltd., the lessor, and further declaring the priority of the mortgagees over the lien allowed.

The Biltmore Park Estates Ltd. was the owner of a certain parcel of land in the county of Welland, and on the 29th June, 1927, it leased a portion of the land owned by it to the Canada Biltmore Club Ltd. for a long term of years. It was a term of the lease that the club should erect a club-house upon the property leased, and it accordingly entered into a contract with the plaintiff company for the erection of the building. There is no question as to the knowledge of the real estate company of the making of the contract, but it was in no sense a party or privy thereto.

It is admitted that the plaintiff company cannot claim a lien as against the estate or interest of the landlord under sec. 7 of the

Mechanics' Lien Act, as no notice was given as required by that Act; but the claim is put forward that, although the building was erected under a contract with the tenant, the landlord can be regarded as an owner within the definition of that term, and so a lien can be claimed upon the landlord's estate and interest, under sec. 5 of the Act. It is said that the work was done on its behalf and with its consent and privity.

This question is conclusively determined against the lien by the decision of the Supreme Court of Canada in *Marshall Brick Co. v. York Farmers Colonization Co.* (1917), 54 Can. S.C.R. 569.

In the earlier decisions two contradictory views were developed as to the true construction of the statute. Firstly, that advocated by the minority of the Supreme Court, Mr. Justice Davies and Mr. Justice Brodeur, that it was sufficient to maintain the lien if it could be shewn that the owner had taken a contract to build, without establishing any direct contractual relationship with the claimant. The other theory, that adopted by the majority, was that this is not enough, and that there cannot be a lien unless there is "something in the nature of direct dealing between the contractor and the persons whose interest is sought to be charged. . . . Mere knowledge of, or mere consent to, the work being done is not sufficient" (p. 581).

Before this decision there was much room for controversy, as the cases in the Ontario Courts were not easy to reconcile. But all controversy has been placed at rest by this binding decision of the Supreme Court, and further discussion of the case would therefore be idle.

The appeal should be dismissed with costs.

MULOCK, C.J.O., and HODGINS and GRANT, J.J.A., agreed with MIDDLETON, J.A.

MAGEE, J.A.:—In this action to establish and enforce a lien under the Mechanics' Lien Act (R.S.O. 1927, ch. 173), the plaintiff company, appellant, is a building contractor, the defendant the Biltmore Park Estates Ltd. is the owner in fee simple of lands, about 121 acres, parts of lot 15 in the 5th and 6th concessions of the township of Bertie; the defendant the Canada Biltmore Club Ltd. is lessee of about two and two-thirds acres, part of those lands, and the defendants Miller are mortgagees of the land having priority to the lease. The two defendant companies may be

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referred to as the Park company and the club. By its statement of claim the plaintiff company asked that its lien should cover the 121 acres, but now limits its claim to the two and two-thirds acres. The facts are not in dispute.

In 1924 one McAleer, then owner, mortgaged to the defendants Miller 75 acres, including the two and two-thirds acres, for \$12,000 and interest. On the 28th June, 1927, his grantee Fanny Harris conveyed the 75 acres to the Park company, of which later she was president, subject to the mortgage. By lease dated the 29th June, 1927, the Park company demised to the club the two and two-thirds acres for 40 years, beginning in January, 1928, at the yearly rent of \$7,500 for the first 5 years, and thereafter at an annual rental equal to 10 per cent. of the appraised value of the lands on appraisements to be made each five years but not to be less than \$7,500 per annum, and the club covenanted to pay taxes and, so soon as buildings placed on the lands, fire insurance; the policies to be payable to and deposited with the Park company. The club further covenanted to construct on the land by the 1st June, 1928, and equip a club-house at a cost of not less than \$100,000, if and on condition that there should be on hand sufficient funds net to the club's credit available for that purpose. If the club failed or refused to construct and equip the building within the time, the Park company was to have the option of cancelling the lease by notice, or might at its option compel the lessee to cause the erection and equipment to be done. The club covenanted to conduct upon the land only a club-house, with the usual rights and privileges, and not to assign or sublet without leave. It was further agreed that in the event of fire the Park company might collect the insurance, and with the proceeds should be obliged to repair or rebuild and equip the premises. The club further agreed that the plans and specifications for the club-house should be submitted to the Park company for approval, change, or modification, and that the construction should be in accordance with the wishes of the Park company and the purchase of the equipment should also be under its supervision and approval. The Park company agreed that the club should have the right to purchase the demised land clear of any mortgage liens on or after the 1st January, 1933, at a value (exclusive of buildings) fixed by appraisers. It also agreed to pay off the mortgage from McAleer to the defendants Miller by the 1st January, 1928, and to hold the club safe and

harmless from any foreclosure proceedings by the holder of the mortgage, and to pay the mortgage, if any foreclosure proceedings taken, and that it would not during the life of the lease encumber the land by mortgage or lien. At the conclusion of the term or its termination for violation of the stipulations the buildings, etc., were to pass and belong to the Park company forever. The club agreed not to suffer or permit the buildings to be mortgaged or encumbered. A final provision was that during the continuance of the lease the club should reserve and keep for the use of the officers of the Park company, or any persons named by it, free of charge, a suite of three rooms with bath.

Six days after this lease, by agreement of the 5th July, 1927, between the Park company and the club, reciting the lease and reciting that the funds for the construction and equipment of the club buildings were to be realised from the sale of stock of the club and life-memberships in a club to be operated by it under the name of Canada Biltmore Club, and that the club had employed the Park company as the exclusive fiscal agent for the selling of the shares and such life-memberships, and that it was desired to set out the conditions, terms, and stipulations by which all the foregoing things were to be accomplished, the two parties agreed that the club thereby appointed the Park company its sole and exclusive agent to sell 2,995 shares and 2,995 life-memberships at prices provided for, and to pay it for such services at rates about 25 per cent. therein specified, the Park company to conduct a campaign of advertisements and pay for advertising literature and other expenses, the moneys derived from such sales to be deposited to the club's credit, and, after payment thereof of the Park company's commission and some attorneys' fees and disbursements, the balance to remain intact until required for the construction and equipment of the club-house, and finally the Park company was thereby vested with general supervision in the construction, erection, and equipment of the club-house, and all plans and specifications made with respect thereto were to be subject to the approval of the Park company. It is to be noted that both the lease and this agreement are signed by the same person as secretary for both companies, along with the president. By agreement dated the 17th July, 1928, between the plaintiff company and the club, therein called "the owner," the contract for the construction of the club-house by the plaintiff company was entered

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into, the club agreeing to pay the plaintiff company \$83,450, subject to additions and deductions. That this contract was really signed later than its date would appear from the next agreement to be mentioned.

By agreement of the 30th July, 1928, between the club and the Park company, both stated to have their principal office at the village of Bridgeburg—after reciting the agreement of the 5th July, 1927, and that there remain unsold about 2,000 memberships and 2,000 shares, and that the club was then about to contract for the erection of the first unit of a club-house to cost about \$83,450, under a contract to be made with Stuart & Sinclair Ltd., and was also obligated to pay certain architects' fees and disbursements, and that the club had then on deposit in a bank \$68,906.85 in a fund designed and intended to be used for the construction of a club-house and certain expenses, and had then outstanding as deferred payment on sold memberships about \$24,900.48, which, if collected, is likewise to be so used, and that the club is unwilling to proceed with the erection of the said first unit because it may not have sufficient funds to pay the contractor and others when required, and that the Park company is willing to lend the club all such sums as the club may require to make payments as per contract made with the contractor and other expenses, after exhausting the moneys on hand, and which might be collected from memberships and stock sold, providing that the club enter into a new agreement appointing the Park company sole and exclusive agent for the sale of memberships and stock, the two parties agreed that the agreement of the 5th July, 1927, was thereby cancelled as to memberships and stock unsold—and the club appointed the Park company its sole and exclusive agent for two years to sell all the unsold founder life memberships and shares of stock, on certain terms of remuneration, and the Park company agreed to lend the club moneys necessary over and above the receipts from sales to meet the payments required for the construction of the club-house and architects' and other fees and expenses—any moneys so lent to be repaid by the club out of proceeds of sales of shares and memberships and the club to be obligated to repay only to the extent of moneys actually received from past or future sales.

Following upon this agreement, the Park company, in its campaign to provide funds, issued an interesting document headed "History of the Canada Biltmore Club Ltd.," stating *inter alia*

that the purpose was to have a club in Canada near Buffalo that could be used for golf, boating, tennis, and social activities; that the Biltmore Park Estates Ltd. undertook to secure members on a commission basis of 25 per cent. of the membership fee, and that the directors of the club are exceedingly anxious to proceed with the building, are willing to enter into an arrangement whereby they will give an option on the remaining 2,000 memberships at a very advantageous price to the Biltmore Park Estates Ltd. in return for its guarantee to erect the first unit of the club-house, and that "under this arrangement the Canada Biltmore Club will agree to turn over to the Biltmore Park Estates Ltd. the unsold memberships (approximately 2,000) at \$125 each to be sold by the Biltmore Park Estates Ltd. at advanced prices," and that "in return the Biltmore Park Estates Ltd. agrees to guarantee the erection of the first unit of the Canada Biltmore Club to cost approximately \$125,000" (adding that it would in all likelihood be unnecessary first to advance a single dollar). It also stated that the Park company had leased to the club about 5 acres, and in addition the Park company owned 115 acres adjoining, on which it was proposed at a later date to build a golf-course to be operated on a green fee basis for the benefit of the members and their guests, and in order to meet the obligation entailed in constructing the first unit it would be necessary to sell only 200 memberships at \$250 each, and this would produce \$50,000, one-half of which would go to the trust fund to complete unit No. 1 and the other half, or \$25,000, would go to the Park company. To sell these 200 memberships a line of sales strategy (as to publicity, etc.) was proposed, and it stated that "to the party providing the bond guaranteeing the erection of the first unit as outlined above the following proposition is proposed: (1) that this party provide a bond for approximately \$40,000; (2) in return the Biltmore Park Estates Ltd. will pay a bonus of \$10,000; (3) the Biltmore Park Estates Ltd. will put up as security its property of 120 acres, which has a minimum value of \$800 an acre, total \$96,000, and the lease with the Canada Biltmore Club, which provides for an annual rental of \$7,500 . . . It will be noted that the Biltmore Park Estates Ltd. is staking its entire holdings, as well as all work done during the past fifteen months in furthering the proposition, amounting to approximately \$250,000."

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The Park company did act upon and endeavour to carry into effect these various documents, which speak for themselves; they did take the part they were entitled to take in relation to the plans and specifications and supervision of the work. The practical and substantial interest of the Park company in having the club-house constructed, entirely apart from the advantage to their adjoining lands or the hope of selling any of them to the club, is manifest. Those adjoining lands they valued at \$800 per acre, and from this club for less than 3 acres they were to get at least \$7,500 per annum, and, unless the club exercised its option to purchase, the Park company would get the building too, and in any event they had the provision for three rooms for their nominees. They were not successful in procuring the money, and the default in payment, the registration of claim for lien, and this action resulted. The amount awarded the plaintiff is not now questioned, and the club admits that the plaintiff is entitled to a lien on its leasehold. The only questions therefore are, whether the Park company's reversion in the leased land is subject to the lien, and whether in any case proper protection is given by the judgment to the plaintiff as regards the mortgage.

As to the interests bound by the lien, that depends on the oft-discussed definition of "owner" in sec. 2 of the Mechanics' Lien Act. Section 5 gives for work done for any owner a lien upon the estate or interest of the owner, and by sec. 2 the word "owner" shall "extend to any person having any estate or interest" at whose request and with whose privity and consent (or on whose credit or behalf or for whose direct benefit) the work is done. Section 7 allows the lien to a limited extent against the estate of persons who may never have heard of the work, such as mortgagees and unpaid vendors, who are thereby placed in the same position as mortgagees, and where a tenant takes it into his head to build, that section binds his landlord's estate if that landlord after notice does not repudiate liability. In such cases there would be no privity in any sense. So also liens are given to subcontractors and contractors under them and suppliers of materials and to workmen against an owner who may never have heard of their existence and with whom that owner has no privity in the sense of any contractual relationship, so that there is no reason in the policy of the Act to attribute that limited sense to the word "privity" in sec. 2, the more especially as consent is also required, which rather implies the absence of contract.

In *Orr v. Robertson*, 34 O.L.R. 147, Tyrrell, lessee of land, sublet to Hyland, with an agreement by Hyland to build, and Hyland employed Orr to do so—the Appellate Division held that the taking of a contract from Hyland to build was a request by Tyrrell, within the meaning of the statute, and that Orr had a lien on Tyrrell's interest. The judgment in that case, delivered by Riddell, J.A., was referred to by him and in his view restricted to its particular facts, but not on that point, in *Marshall Brick Co. v. Irving*, 35 O.L.R. 542. In that case the York Farmers Company sold land to Irving, binding him to build and agreeing with him to furnish him money to do so, and furnished it. Irving purchased brick from the plaintiffs, who claimed a lien on the land against the vendors. Irving's rights as purchaser had been forfeited, and his vendors had the land and building back as owners within sec. 2 of the Act. Meredith, C.J.C.P., pointed out that the section (now sec. 7) placed an unpaid vendor in the position of mortgagee against whom the lien would only be to the extent of the increase in value by reason of the building—but he held (p. 545) that that would not prevent mortgagees from being more than mortgagees, and that they would be “owners” if they come within the definition of “owner” in sec. 2. He said nothing was done or supplied by the plaintiff at the vendor's request, and there was no privity and consent; that privity meant knowledge and acquiescence, and was perhaps ambiguous, but the requirement of consent made the question unimportant—and no consent had been asked or given, and he would dismiss the action against the vendors as owners but gave leave to the plaintiff to apply for a reference on the basis of the vendors being considered mortgagees. Masten, J.A., agreed with this result. Riddell, J.A., reviewing the cases, said that “the sole law laid down with precision being that mere knowledge of or mere consent to the work is not privity and consent”—with which he wholly agreed—but beyond that he thought each case must be determined upon its own facts—and he could find nothing in this case to shew that the work was done at the request of the company. This conclusion seems hardly consistent with his express decision in *Orr v. Robertson*. Lennox, J., held that a mortgagee might become an owner within the definitions in sec. 2, but that these vendors had not done so and the lien would only take effect against them as mortgagees. This decision was, I think, in direct

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conflict with *Orr v. Robertson*, and the difference between binding a purchaser or a lessee to build and merely allowing him to do so was not dealt with—and I do not see how it could be held that a man did not consent to a thing which he bound a man to do. However the case went to the Supreme Court of Canada (*Marshall Brick Co. v. York Farmers Colonization Co.*, 54 Can. S.C.R. 569), and by a majority the appeal was dismissed, Davies, J., and Brodeur, J., dissenting. They held that the vendors had become owners, the work being done at their request by binding Irving to build, and with their privity and consent. Anglin, J., accepted as settled law the view enunciated in *Graham v. Williams* (1884-5), 8 O.R. 478, 9 O.R. 458, and *Gearing v. Robinson* (1900), 27 A.R. 364, that there must be “something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged . . . mere knowledge of, or mere consent to, the work being done is not sufficient.” But in neither of those cases had the lessor required or obtained a contract from his lessee to build, but had only assented to his building, and there was only mere knowledge or consent, and the requirement of a direct dealing was unnecessary, and, as I think, *obiter dictum*, and, as I venture to think, unwarranted in the present case. It cannot however be looked upon as *obiter* in the case before the Supreme Court. Duff, J., simply concurred in dismissing the appeal, agreeing with the conclusions of Meredith, C.J.C.P., and the reasons assigned therefor. Chief Justice Sir Charles Fitzpatrick merely said he did not dissent from the judgment dismissing the appeal, reserving to the appellant the right to a reference.

Unless this case can be distinguished on the facts, therefore, it would seem that we are bound by that decision. Here, in addition to the Park company binding the club to build, we have the express mention of the contract with the plaintiff in the club's agreement with the Park company, and we have the supervision and right of alteration of plans and work, and there is the provision for the use of the three rooms by the Park company's officers or nominees. There is the making of profit by the Park company in raising funds to be expressly applied on the building contract.

These facts do, I think, distinguish the case from that decision, and I would allow the appeal.

But, even if the lien be limited to the leasehold interest of the club, there is the question of the mortgage. That mortgage, as between the Park company and the club, must be assumed wholly by the other parts of the mortgaged land, to the exoneration of the leased land—that was expressly agreed by the Park company, and that has not been dealt with by the judgment. If all the facts are before the Court, there should be a declaration to that effect, and the sale directed should be effected on that basis. The rights of the mortgagees, of course, are not to be affected. But it may be that other parcels of the mortgaged lands have been sold or dealt with giving other persons the like rights of exoneration; and, unless counsel agree that it is unnecessary, there should be a reference back or to the Master to inquire as to possible interests of others before the sale.

I would allow the appeal and with costs.

*Appeal dismissed (MAGEE, J.A., dissenting).*

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[APPELLATE DIVISION.]

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*Mortgage—Discharge—Forgery by Solicitor—Receipt for Mortgage-money—Acknowledgment in Deed—Conveyancing and Law of Property Act, R.S.O. 1927, ch. 137, sec. 6—Estoppel—Mortgage not Valid Charge against Land—Duty of Person Advancing Money to See that Solicitor had Authority to Receive it—Judgment by Default against Mortgagor—Counterclaim—Interest and Costs Paid by Assignee of Equity of Redemption.*

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J. purchased land from Mrs. Y. for \$8,125 and made a mortgage to her upon the land to secure \$6,125, balance of the purchase-money. The mortgage fell due on the 18th May, 1924, and she instructed her solicitor, C., to collect the arrears of interest due to her. J. had gone abroad, leaving his business affairs in the hands of H. Negotiations took place between C. and H. in which C. threatened to put the mortgaged land up for sale and did in fact advertise it, but H. dissuaded him from selling, and paid for J. something on account of the mortgage. To facilitate the borrowing of enough to discharge the Y. mortgage, upon C.'s suggestion to H., a mortgage was prepared in favour of C. and sent to J. for execution. It was duly executed by J. H. found a willing lender, the plaintiff, who agreed to lend the amount necessary to discharge the Y. mortgage. It was explained to her that the transaction would be carried out by an assignment to her of C.'s mortgage. At her instance and acting as her agent, H. gave O., the plaintiff's solicitor, the necessary information to enable him to search the title for her. O. searched the title, found on the register the Y. mortgage, and on receiving what he thought was a discharge of the mortgage executed by Mrs. Y., handed over to C. the plaintiff's cheque for the amount

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named, made payable to C., at the request of H.—the mortgage from J. to C., the assignment to the plaintiff, and the discharge of the Y. mortgage being registered contemporaneously. It turned out that C. had no authority from Mrs. Y. to receive the mortgage-money, and that the discharge of the mortgage was a forged document. In May, 1928, Mrs. Y. learned the truth and brought an action to enforce her mortgage, in which it was found that C. had no authority to receive the money and that the discharge was forged; and appropriate relief was granted to her. In the meantime, by deed of the 1st June, 1926, J. had conveyed the land in question to a company, which was a defendant in this and also in Mrs. Y.'s mortgage action, and which appealed from the judgment at the trial of this action, which was in favour of the plaintiff, declaring the validity of the plaintiff's mortgage:—

*Held*, that the assignee of a mortgage takes it subject to the state of accounts between the mortgagor and the mortgagee; and C. could not assert any claim against J. or his assignee; but when the mortgagor has given a receipt shewing that the mortgage-money had been actually advanced, and the assignee has no knowledge that this is not the truth, and in the purchase of the mortgage relies upon the receipt, the assignee, a purchaser for value without notice, has an equity superior to the right of the mortgagor to be relieved from the legal effect of the document which he has executed.

*Bickerton v. Walker* (1885), 31 Ch. D. 151, followed.

The Conveyancing and Law of Property Act, R.S.O. 1927, ch. 137, sec. 6, places the receipt in the body of the conveyance in the same situation as if it were endorsed on the mortgage.

To constitute an estoppel, it is essential that the truth should not be known to the party relying upon the estoppel; and in this case the plaintiff had notice that the money had not been advanced by C. upon this mortgage, and that the only money which was being advanced upon it was that which she herself was advancing, which was to be used for the purpose of paying off Mrs. Y.'s mortgage.

It was the duty of the plaintiff and her solicitor to see that C. had authority to receive the money; and, he having no authority, she must bear the loss. The plaintiff could not charge against J. or the appellant company the money which she did not pay to J. or to any one authorised by J. to receive it for him.

H., when he requested the plaintiff to make her cheque payable to C., was not representing J.—he was then acting for the plaintiff and advised her to do so.

J., though a defendant, did not appear in the action; and the judgment now pronounced should be without prejudice to the right of the plaintiff to take a default judgment against him.

The appellant company counterclaimed against the plaintiff for interest paid upon the mortgage and also for the costs paid in defending the action brought by Mrs. Y.:—

*Held*, that, the payments of interest having been made in ignorance of the fact that the Y. mortgage had not been discharged, and there being nothing to indicate that this mistake of fact resulted from any representation of the plaintiff, there was no right to recover the amount paid; and, the appellant company not being compelled to defend the Y. action by any misconduct of the plaintiff, the costs of defence could not be recovered from her.

ACTION by a mortgagee of land for foreclosure, for payment of the mortgage-moneys, pursuant to the covenant contained in the mortgage-deed, and for damages for breach of covenants.

The action and a counterclaim were tried before GARROW, J., without a jury, at a Toronto sittings.

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*J. C. McRuer*, K.C., for the plaintiff.

*J. M. Bullen*, for the defendant the Toronto Wine Manufacturing Company.

August 26, 1930. GARROW, J.:—This is another of the numerous actions arising out of the defalcations of one Campbell, a solicitor.

Jannetta was the owner of certain property, abutting on Queen-street, in the city of Toronto. He had purchased it from a Mrs. Young, and to secure part of the purchase-money had given her a mortgage upon the property. This mortgage fell in arrears, and Campbell, Mrs. Young's solicitor, was instructed to take sale proceedings, which were begun, but from time to time the actual sale of the property was postponed.

One Thomas Hook, now deceased, was the agent for Jannetta while the latter was abroad in Italy, and the late E. W. J. Owens was Jannetta's solicitor.

The Young mortgage was past due and could be paid off at any time, and it was, in consequence, impossible to find a purchaser for it, and Campbell conceived the idea of having a new mortgage prepared in his name as mortgagee, which was to be subsequently assigned to some one willing to advance the money, the proceeds to be used to pay off Young. On the 19th May, 1925, Campbell wrote to Hook as Jannetta's agent enclosing a mortgage from Jannetta to himself and asking Hook to send it on to Jannetta for execution. He added: "Also have him give you a letter with instructions to pay over the money received from this mortgage to Mrs. Chillcott Young so that she can be paid off at once."

On the same day Hook forwarded the mortgage to Jannetta, enclosing Campbell's letter with it, and adding in his own letter the statement that "the proceeds of this mortgage when sold is to be applied on the present mortgage held by Mrs. Young."

Jannetta read and understood these letters, and executed the mortgage and returned it to Hook, but did not apparently give him the express instructions suggested by Campbell as to the disposition of the money. Hook then set out to find a purchaser for the new mortgage and found the plaintiff. She was told by Hook that she was purchasing a first mortgage from Campbell

Garrow, J. upon Jannetta's property, and, at his suggestion and dictation,  
1930. the cheque of the plaintiff was made payable to Campbell. She  
LIVINGSTONE was not informed of the existence of the Young mortgage, al-  
v. though I do not suggest that Hook deliberately concealed the fact  
JANNETTA. from her. It was simply not mentioned to her.

Hook knew that Owens was Mrs. Livingstone's solicitor, as he was also Jannetta's, and he (Hook) wrote to Owens on the 24th June, 1925, advising him that Mrs. Livingstone was buying a mortgage given by Jannetta to Campbell, the proceeds to be used to pay off the mortgage held by Mrs. Young, and adding that, "when the necessary papers are executed and the title found satisfactory, I will give you the necessary cheque for the said amount." In a postscript he said, "Mr. John A. Campbell, of King-street west, is the solicitor with whom you can communicate."

Owens apparently communicated with Campbell, and the latter prepared and executed an assignment from himself to the plaintiff. I have seen in the correspondence filed no letter from Hook to Owens enclosing the plaintiff's cheque, but it was undoubtedly sent to him because on the 9th July Owens wrote to the plaintiff in care of Hook and also to Hook himself advising that he had obtained from Campbell an assignment of a first mortgage from Campbell, that the title was satisfactory, and that he had closed the matter with Campbell and handed over the plaintiff's cheque and obtained and registered a discharge of the Young mortgage. He enclosed a bill against Jannetta for his services in connection with the matter, which was subsequently paid. The discharge of the Young mortgage, the mortgage from Jannetta to Campbell, and the assignment from Campbell to the plaintiff, were registered in the order mentioned.

It subsequently appeared that the signature to the discharge of the Young mortgage was forged by Campbell, and in an action brought by Mrs. Young, in which all parties to the present action were defendants, it was so held, and also that the Young mortgage was still a valid and subsisting security against the lands, the equity of redemption in which had in the meantime been conveyed by Jannetta to the defendant the Toronto Wine Manufacturing Company.

By this decision the plaintiff is, of course, bound, but it does not prevent her asserting, as she contends, that her mortgage is a valid security subject to the mortgage to Young, and, default

having been made in payment of an instalment of interest, this action is brought for foreclosure and payment under the covenant and for damages for breach of the covenants contained in the mortgage, in that she was compelled to defend the action brought by Mrs. Young on her mortgage.

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The action is not defended by Jannetta or his wife, and as against them the pleadings have been noted closed. It is resisted by the defendant company on the ground that the plaintiff's money was intended to be used for the purpose of paying off the Young mortgage, and that it was through the neglect or default of the plaintiff or her agents that this was not done. And this defendant also counterclaims for repayment of all interest paid in the meantime and for damages for having also been obliged to defend the Young action.

I find on the evidence that Hook was the agent of Jannetta alone, that it was not disclosed to the plaintiff that the money advanced by her was to be used to pay off a prior mortgage, and that it was Hook, as such agent, who caused the cheque to be made out in the name of Campbell. By doing so, he, in effect, said to the plaintiff on behalf of Jannetta, "Pay your money to Campbell." It was entirely proper and natural from the plaintiff's point of view, she being ignorant of the existence of the prior mortgage, that her cheque should be issued to the assignor of the mortgage.

The real question appears to be whether this situation is altered by the fact that Owens, who, as I would hold, was acting both for Jannetta and for the plaintiff, was informed by Hook of the intended use to which the money was to be put. If the money had been placed in Owens' control, it would undoubtedly have been his duty, acting on behalf of the plaintiff, to see that it reached its proper destination: *Orme v. Grant* (1924), 26 O.W.N. 93; *Murray v. Crossland* (1929), 64 O.L.R. 403. And, failing that, the plaintiff would have been the loser. But the defendant through his agent Hook referred Owens to Campbell as being the person with whom he should communicate, and said in substance, "When you are satisfied on behalf of Mrs. Livingstone that the title is satisfactory, I will send you the necessary cheque." and the cheque that was sent was, as before stated, one which he had already procured to be made payable to Campbell. In my opinion, Owens carried out the intent of the instructions given

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him, and those instructions, so far as regards the delivery of the cheque to Campbell, were the instructions of Hook acting on behalf of Jannetta. That being so, Jannetta could not, nor can his subsequent transferee, the defendant company, properly be heard to say that the money had not been advanced on the security of the mortgage assigned by Campbell to the plaintiff.

It is, of course, like all these cases, one of great hardship, but where one of two innocent persons has, by his act or conduct, made it possible for a fraudulent third party to deceive them both, that one must suffer the loss that follows: *Gordon v. James* (1885), 30 Ch. D. 249, at p. 258.

The present case is very like the case already referred to of *Orme v. Grant*. But there is this distinction between them—in that case Dick, the solicitor for the mortgagee, had the money in his own control, and without any authority paid it over to L., the defaulting solicitor. The result, I think, would have been different had Grant, the borrower, expressly authorised the payment.

The case is also distinguishable, I think, from *Murray v. Crossland*, in that there the plaintiff knew the purpose for which the money was obtained. Here the plaintiff himself knew nothing except that she was buying a mortgage from Campbell, to whom her cheque was payable, and while her agent knew that his function, so far as the payment of the money was concerned, was simply to hand over the cheque to the nominee of the defendant Jannetta.

In my opinion, therefore, the plaintiff's mortgage is a valid security, subject to the mortgage to Young, and, it being in default, she is entitled to payment on the covenant and to foreclosure in default.

As to the claim for damages, it was not very seriously pressed, I think, but in any case I would disallow it. It is confined to a claim for having been obliged to defend the Young action. She, the plaintiff, was not obliged to defend it, and does not now apparently quarrel with the result of it, nor is she asking for damages for the fact that she finds herself in the position of a second mortgagee instead of that of a first.

There will be judgment therefore declaring that the mortgage in question is a valid mortgage, subject to the prior mortgage to Young, and for payment under the covenant contained in the mortgage, and in default foreclosure with the usual reference as

to subsequent encumbrances, if necessary, and with costs of the action.

The counterclaim is dismissed with costs.

The defendant the Toronto Wine Manufacturing Company Ltd. appealed from the judgment of GARROW, J.

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February 25 and 26, 1931. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*J. M. Bullen*, for the appellant company, contended that the plaintiff had no second mortgage, because the money advanced went, to her knowledge, to Campbell and not to the owner of the property. The mortgage made to Campbell was not a valid mortgage because no money was advanced under it. The purchaser of that mortgage got no higher rights than Campbell had. This question was not dealt with by the learned trial Judge.

*Shirley Denison*, K.C., and *F. A. Brewin*, for the plaintiff, respondent, argued that she is in a higher position than Campbell because the mortgage was given by the mortgagor to be dealt with in the way in which it was dealt with, and Campbell became the agent of the mortgagor, who was bound by his (Campbell's) acts. As regards the first mortgagee, the respondent might be bound to see that the proceeds went to pay off the first mortgage, but that liability cannot exist towards any one else in the circumstances of this case. If the mortgagor signs the receipt for the mortgage-money, which is contained in the mortgage, he may be estopped from denying that he got the money: *Bickerton v. Walker* (1885), 31 Ch. D. 151. Mr. Owens was undoubtedly the respondent's solicitor for the purpose of closing the transaction, but he had no knowledge, except for the letter of the 24th June, that Campbell had not advanced any money. The appellant's argument admits that if the first mortgagee had got the money instead of Campbell, the respondent's mortgage would then be a good mortgage for consideration. Campbell was, first of all, the first mortgagee's solicitor for the purpose of collecting her mortgage-money. Campbell then became the broker in whose name the second mortgage was taken. It was never intended that the money should be advanced under this second mortgage. This was not a complete transaction. It was the second mortgage plus the assignment thereof which constituted the complete transaction. But, although he was advised to do so, the mortgagor (Jannetta) gave no letter

App. Div. directing the money to be paid to the first mortgagee (Mrs. Young). The letter of the 24th June was notice to Owens, not 1931. that no money had been advanced by Campbell, but that the proceeds of the sale of Campbell's mortgage was to go to Mrs. LIVINGSTONE v. JANNETTA. Young. In the absence of a letter of instruction from the mortgagor (Jannetta), Owens or the respondent could not pay the money to any one but the person from whom the mortgage was purchased, i.e., Campbell. Campbell is the man designated to receive the money, and he was trusted by Jannetta to do his duty. The Trustee Act, R.S.O. 1927, ch. 150, sec. 24, permits payment to a person for a limited purpose as in this case. Money was paid to Campbell for the limited purpose of paying Mrs. Young. There was no negligence on the part of the respondent in paying the money to the person designated by Jannetta when he signed the mortgage in favour of Campbell. The respondent had no duty towards Mrs. Young. Her sole duty was to Jannetta. That duty was discharged by payment to the person designated by him. The appellant does not stand in the shoes of Jannetta. The respondent's negligence, if any, was personal towards Jannetta. The appellant should not now be able to take advantage of that. Reference to *London Freehold and Leasehold Property Co. v. Baron Suffield*, [1897] 2 Ch. 608, at p. 615. Hook had absolute authority from Jannetta, and it was Hook who instructed the respondent to make her cheque to Campbell. Jannetta cannot complain of that.

*Bullen*, in reply. Up to the time that the respondent handed over the money, Hook was the agent of Jannetta, but he then became the agent for the respondent in valuing the property and in instructing Mr. Owens to search the title on her behalf. If Hook told the respondent as the appellant's agent to make the cheque payable to Campbell, he was exceeding his authority: *Orme v. Grant*, 26 O.W.N. 93. The appellant is entitled to the return of money paid in mistake of fact under this mortgage.

April 20. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal from the judgment of Mr. Justice Garrow, pronounced on the 26th August, 1930, declaring that a certain mortgage made by the defendant Jannetta in favour of one J. A. Campbell, bearing date the 18th day of May, 1925, and assigned by the said J. A. Campbell to the plaintiff by indenture bearing date the 24th day of June, 1925, is a valid and subsisting mort-

gage, subject only to a certain prior mortgage made by Jannetta to one Georgina C. Young, dated the 24th March, 1922, and awarding appropriate relief with respect to the enforcement of this mortgage.

The material facts are as follows. Jannetta purchased the lands in question from Mrs. Young for the sum of \$8,125, and the mortgage given to her was to secure the sum of \$6,125, balance of the purchase-money.

This mortgage fell due on the 18th May, 1924, and, it being then unpaid, she instructed her solicitor, Mr. John A. Campbell, to collect the arrears of interest due to her. Jannetta, the mortgagor, was an Italian, and had gone to Italy, leaving his business affairs in the hands of one Hook, a real estate agent.

Negotiations took place between Campbell and Hook in which Campbell threatened to put the property up for sale, and did in fact advertise it, but Hook dissuaded him from selling, and paid for Jannetta something on account of the mortgage. To facilitate the borrowing of enough to discharge the Young mortgage, Campbell suggested to Hook that a mortgage be prepared and executed in favour of himself (Campbell), and that this should be sent to Italy for execution, when, if one could be found willing to lend the necessary amount upon the security of the property, Campbell would assign the mortgage to the lender and delay would be avoided. The mortgage was accordingly prepared, sent to Italy, and duly executed.

In the meantime Hook had been searching for a willing lender, and communicated with the plaintiff in this action, Mrs. Livingstone. She inspected the property and agreed to lend the necessary amount. It was explained to her that the transaction would be carried out by assigning to her the mortgage held by Campbell.

At her instance, and acting, as I think, as her agent, Hook undertook to communicate with Mr. Owens, who was Mrs. Livingstone's solicitor, and give him the necessary information to enable him to search the title for her. Hook carried out his instructions by writing to Owens the letter of the 24th June, 1925:—

"Mrs. Livingstone is buying a mortgage given by Dominick Jannetta to John A. Campbell for \$6,125; for five years from 15th May last, with interest at 7% per annum payable half-yearly covering the above property (1682 Queen St. W.), and the proceeds of this mortgage is to be used for paying off a previous mort-

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gage for \$6,125 given by Jannetta to Mrs. Chilcott Young, which mortgage is past due, and when the necessary papers are executed and the title found satisfactory I will give you the necessary cheque for the said amount."

A few days later, Mrs. Livingstone called upon Hook, and he took from her a cheque for the amount named, payable to Mr. Campbell, and handed it over to Mr. Owens to be used by him in the completion of the transaction. In all this, I also think, Hook was acting as agent for Mrs. Livingstone.

Owens searched the title, found the mortgage to Mrs. Young, and on receiving what he thought was a discharge of this mortgage, executed by her, handed over the cheque to Campbell—the mortgage from Jannetta to Campbell, the assignment to Mrs. Livingstone, and the discharge of the Young mortgage, being registered contemporaneously.

It now turns out that Campbell had no authority from Mrs. Young to receive this mortgage-money, and that the discharge of the mortgage which he gave to Owens was a forged document. Campbell has gone to parts unknown. Owens and Hook are both dead, so that much of what took place has to be gathered from the contemporaneous correspondence, which is produced and gives a very accurate idea of that which took place.

On the 29th May, 1928, Mrs. Young, who had up to that time been kept satisfied by remittances of interest made to her by Mr. Campbell, learned the truth and brought an action to enforce her mortgage. In this action it was found that Campbell had no authority to receive the money and that the discharge was forged, and appropriate relief for the enforcement of the mortgage was granted to her.

In the meantime, by deed bearing date the 1st June, 1926, Jannetta had conveyed the lands in question to the Toronto Wine Manufacturing Company, the present appellant, which is also a defendant in Mrs. Young's mortgage action.

In this action the question raised is whether the plaintiff must bear the loss occasioned by Campbell's rascality, or whether the mortgage in her hands is a valid security, capable of being enforced against the wine company.

A general principle has been established by a long series of cases that the assignee of a mortgage takes the security subject to the state of accounts between the mortgagor and the mortgagee,

the assignee being unable to assert any greater right than the assignor. Here it is plain that Campbell could not himself assert any claim as against Jannetta or his assignee.

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To this general rule there is a well-established exception. When the mortgagor has given a receipt shewing that the mortgage-money has been actually advanced, and the assignee has no knowledge that this is not the truth, and relies upon the receipt in the purchase of the mortgage, the assignee, a purchaser for value without notice, has an equity superior to the right of the mortgagor to be relieved from the legal effect of the document which he has executed. It is sufficient to refer to the judgment of the Court of Appeal in *Bickerton v. Walker*, 31 Ch. D. 151.

True it is, that in that case the receipt which was held to constitute an estoppel was endorsed upon the document, but our statute, the Conveyancing and Law of Property Act, R.S.O. 1927, ch. 137, sec. 6, places the receipt in the body of the conveyance in precisely the same situation.

To constitute an estoppel it is however necessary that the truth should not be known to the party relying upon the estoppel. In this case the letter from Hook to Owens gave to Owens, Mrs. Livingstone's solicitor, abundant notice that the money had not been advanced by Campbell upon this mortgage, and that the only money which was being advanced upon it was that which she herself was advancing, which was to be used for the purpose of paying off and discharging Mrs. Young's mortgage. The whole transaction—the contemporaneous registration of the three documents—also indicated the true nature of that which was being accomplished.

It is to be noticed that the discharge of the Young mortgage bore date the 26th June, 1925, some weeks after the date of the Campbell mortgage, and practically a date contemporaneous with the registration of the three documents, the 26th June, 1925.

It was, I think, the duty of the plaintiff and her solicitor to see that Campbell had authority to receive this money. She was advancing the money to pay off this mortgage, and, when she paid it to any one other than the mortgagee whose claim she had undertaken to discharge, she did so at her own risk, and when it is shewn that Campbell had no authority to receive the money, and had forged the discharge, she must bear the loss.

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The question is not whether Owens has so negligently conducted himself as to be liable to his client. It is a widely different one. Can the plaintiff charge against Jannetta the money which she did not pay to him or to any one authorised to receive it for him?

It is suggested that the request by Hook to Mrs. Livingstone to make her cheque payable to Campbell amounted to an authorisation by Jannetta to adopt that course. I do not think that Hook was in any way representing Jannetta on this occasion. He was acting for Mrs. Livingstone, and advised her to make the cheque payable to Campbell. There is no suggestion that Hook had any authority whatever to bind Jannetta.

When Campbell stole this money, he stole it from Mrs. Livingstone and not from Jannetta.

I think the appeal must be allowed, and it should be declared that the mortgage in question is not a valid or subsisting charge against the lands in question.

A difficulty arises by reason of the fact that Jannetta has not appeared in the action. By his default he has admitted liability upon this mortgage, and I think that the judgment to be pronounced should be without prejudice to the right of the plaintiff to take a default judgment against him upon his covenant.

I can see no reason why costs should not follow the event, as they did in the Court below.

The wine company counterclaims as against the plaintiff for the sum of \$1,286.28 interest paid upon the mortgage and also for the amount of costs paid in defending the action brought by Mrs. Young.

The payments of interest made were made in ignorance of the fact that the Young mortgage had not been discharged. There is nothing to indicate that this mistake of fact resulted from any representation of the plaintiff. She, as well as the appellant, had been defrauded by Campbell, and there is no right to recover the amount so paid.

With reference to the costs of the former litigation, the appellant was not compelled to defend that litigation and be put to costs by reason of any misconduct on the part of the plaintiff. The counterclaim, I think, should be dismissed without costs.

*Appeal allowed.*

## [APPELLATE DIVISION.]

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*Bankruptcy—Broker—Purchase of Shares on Margin—Deposit of Bonds as Collateral Security in Lieu of Cash — Repledge of Bonds by Broker to Banks—Subsequent Bankruptcy—Obligation of Trustee to Return Bonds—Application Made in Bankruptcy.*

The judgment of GARROW, J. (1930), 66 O.L.R. 391, was affirmed.

*Held*, that, when collateral security is deposited with a broker and is by him pledged to a bank for any sum, and the loan from the bank is entirely paid off, and at the same time the debt to the broker for which the collateral has been deposited, the rights of both the broker and the bank are at an end, and the owner of the collateral is entitled to its return.

The subject-matter of the application in this case was not a sum of money but a tangible piece of property, as to which no right not represented by the trustee in bankruptcy could intervene; and the application was therefore a proper one to make in bankruptcy.

AN appeal by the trustee in bankruptcy of the property of Wiggins Ltd. from the judgment of GARROW, J. (1930), 66 O.L.R. 391.

February 9. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*The Hon. N. W. Rowell, K.C., and H. A. Ayles*, for the appellant, contended that the respondent was bound by the terms of the "bought and sold note," even though he did not sign it. By the provisions of this note Wiggins Ltd. was entitled to pledge the respondent's bonds. However, assuming that the bonds were wrongfully pledged by Wiggins Ltd., the trial Judge erred in directing the trustee to deliver them to the respondent without paying to the trustee his *pro ratâ* share of the indebtedness to the banks to which the bonds were pledged, as required by the resolution of the inspectors passed on the 25th March, 1930. The respondent was a co-surety and so must contribute *pro ratâ* with all other co-sureties: *Re Bryant Isard & Co., Ex p. Turner* (1925), 29 O.W.N. 167, 7 C.B.R. 44. The principle of equality of distribution must be given effect to, once bankruptcy intervenes. Reference to *Haggart v. Trusts and Guarantee Co. Ltd.* (1930), 65 O.L.R. 23, at pp. 27 and 28; Campbell, *The Law of Stockbrokers*, 3rd ed., pp. 91, 94, 96; *In re Toole* (1921), 274 Fed. Repr. 337, at p. 342; *Brown v. McLean* (1889), 18 O.R. 533.

*Lewis Duncan*, for the respondent. The collateral was wrongfully pledged by Wiggins Ltd. The contract itself did not give any right to it to pledge the bonds, and the uncontradicted evi-

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dence of the respondent is that he did not give such permission. The only right the banks had to retain the bonds was by reason of the fact that Wiggins Ltd. was indebted to them. When the appellant paid off the amount of this indebtedness, the respondent was entitled to have the bonds returned to him. It was the duty of the trustee to pay this indebtedness out of the general assets of the estate. The appellant did not acquire any right to the bonds, even though he did pay the money to the banks, for any right which the banks had disappeared on payment of the amount owing. Reading sec. 9(6) and sec. 23 of the Bankruptcy Act, R.S.C. 1927, ch. 11, together, all "the property of the debtor" vests in the trustee. This does not include property held by a debtor in trust for another person, and so it does not include the bonds given by the respondent to Wiggins Ltd., as security. The respondent tendered payment of the amount owing by him on three different occasions, all of which were prior to the date of the assignment. Upon these tenders being made, the respondent was entitled to have the bonds returned to him. Reference to *Donald v. Suckling* (1866), L.R. 1 Q.B. 585, at p. 608; Halsbury's Laws of England, vol. 13, p. 149; *Re Orzy* (1923), 53 O.L.R. 323; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120, 140.

*Rowell*, K.C., in reply. By sec. 36 of the Bankruptcy Act, the trustee is trustee for the creditors. He must distribute the assets in accordance with the provisions of the Act.

April 20. The judgment of the Court was read by HODGINS, J.A.:—Appeal by the trustee in bankruptcy from the judgment of Mr. Justice Garrow, sitting in bankruptcy, delivered on the 27th November, 1930, whereby he directed that certain Victory bonds belonging to Robertson, and pledged by him with Wiggins Ltd. as collateral to the purchase of certain stocks, should be delivered up to Robertson. The learned Judge sets out the facts in his judgment, which are, briefly, that the trustee, after the assignment in bankruptcy, directed the sale of Robertson's stocks, which was done advantageously so as to leave a credit balance in his favour of \$105.32. With the money derived from this, and other sales at the trustee's direction of customers' stock, the trustee paid off the banks with whom Wiggins Ltd. had pledged the stocks, together with Robertson's collateral. The moneys received by the trustee after the claims of the banks were paid off remain in his

hands, as well as the Victory bonds deposited as stated with Wiggins Ltd.

The learned trial Judge was of the opinion that the collateral formed no part of the insolvent's estate, and under the circumstances Robertson was entitled to have them delivered to him.

In dealing with the argument addressed to us on behalf of the trustee, it may be desirable to consider, first, the actions of the trustee, and the situation on the 1st February, 1930, when Wiggins Ltd. made an assignment in bankruptcy to him. At the date of the assignment Wiggins Ltd. had three bank-accounts in Ottawa, two of which come in question here, one in the Bank of Montreal and one in the Bank of Toronto. These banks held stocks and collaterals, pledged to them by Wiggins Ltd., more than enough to cover their claims against that company. With the approval of the inspectors of the estate, other than Robertson, the trustee, after the assignment in bankruptcy, "closed out all . . . of the said accounts," and received from the banks the moneys derived from the sales of certain of the stocks held by them after deducting their claims and, as well, the unsold collaterals which they held. These collaterals included the three Dominion Government bonds deposited with Wiggins Ltd. by Robertson as collateral security on his purchases of stock in the Noranda and Teck-Hughes mines. The sale directed by the trustee was made on the 27th February, 1930, and included therein were Robertson's stocks, 100 shares in Noranda Mines Ltd., and 100 shares in Teck-Hughes Gold Mines Ltd. At that time, according to the affidavit of the trustee, the Bank of Montreal held, among other securities, "identifiable securities deposited with Wiggins Ltd. by customers and pledged to Wiggins Ltd. with the Bank of Montreal." This is true also of the Bank of Toronto, and amongst these identifiable securities were the Victory bonds in question. The affidavit further states that:—

"The money used by me to pay off the loans to the said banks on or about March 5th, 1930, was money received by me as the net proceeds after closing out the accounts of Wiggins Ltd. with West & Co. and Moysey & Co., two other brokerage firms, through which Wiggins Ltd. placed orders as hereinbefore described."

Under these circumstances, and assuming, without deciding, that Robertson's collateral, as well as the stocks which had been purchased for him, were properly pledged to the banks, it follows

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that when, on the 5th March, 1930, the trustee paid the banks off, the special property which they had in the securities pledged was at an end. This special property included not only the right of possession but also, as pointed out by Chief Justice Cockburn in *Donald v. Suckling*, L.R. 1 Q.B. 585, at p. 619, "a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the proper time." When therefore the claims of the banks were satisfied by the sale of the securities pledged to them, including the Noranda and Teck-Hughes stocks of the appellant Robertson, any interest which the banks had in the unsold collateral was at an end. The moneys they paid over to the trustee included a credit balance in Robertson's favour of \$105.32, realised from the sale of Robertson's Noranda and Teck-Hughes stocks. With the rights and duties of the trustee regarding the moneys now in his hands derived from the sale of the securities held by the banks, including this sum of \$105.32, the Court is not at present concerned. It is suggested that other parties might conceivably intervene to demand a share of it when the fund now in his hands comes to be distributed. But the interest of the banks under the transactions outlined having completely terminated, and the collateral security for Robertson's indebtedness (which indebtedness no longer exists) having come back, through the action of the trustee, into his hands, it would naturally seem to follow that no basis for a claim by other parties who may have dealt with Wiggins Ltd. can possibly exist in respect to identifiable securities, the property in which has never been divested from the true owner and the possession of which in the hands of the trustee has ceased to have any legal justification.

In a recent case in the House of Lords, *Ellis & Co.'s Trustee v. Dixon-Johnson*, [1925] A.C. 489, Lord Cave, L.C., says (pp. 491, 492):—

"I have always understood the rule in equity to be that, if a creditor holding security sues for his debt, he is under an obligation on payment of the debt to hand over the security; and if, having improperly made away with the security, he is unable to return it to his debtor, he cannot have judgment for the debt.

.....  
I am unable to understand how the bankruptcy can have so modified the rights of the respondent. If immediately before the

bankruptcy the brokers had sued the respondent for the balance owing on his account, they would have been met and defeated by the equitable rule to which I have referred. The effect of the bankruptcy was to close the account which had been running and to transfer the rights of the brokers to the trustee in their bankruptcy. But the rights of the trustee were no larger than had been the rights of the brokers and were subject to the like condition as to the return of the securities. There was no mutual credit within the meaning of sec. 31 of the Act, for the right of the defendant (the present respondent) was not to a money payment present or future, but to a return of his shares in specie as and when he paid off his debt."

Lord Dunedin, Lord Atkinson, Lord Sumner, and Lord Buckmaster concurred in the judgment delivered by Lord Cave.

Fisher, J.A., took the same view in a case similar to this, *Re Bryant Isard & Co., Ex p. Fair* (1922), 22 O.W.N. 402, 2 C.B.R. 471, saying:—

"I have come to the conclusion that these Victory bonds were pledged as collateral security and not as cash with the insolvent firm, and that the creditor Fair is entitled to these Victory bonds."

The remarks of Masten, J.A., in *Re Bryant Isard & Co., Ex p. Turner*, 29 O.W.N. 167, 7 C.B.R. 44, at p. 49, led me to think that the Second Divisional Court would have come to the same conclusion had it been necessary in that case, because he says, in speaking of collateral securities which had been wrongly disposed of by the bankrupt:—

"There is no suggestion that they ever came in specie to the trustee or that they were ever returned in specie to the claimants. The result was that on the 3rd of March the trustee credited each of these parties, Turner included, with the value of the collateral deposited by him . . . (and) on that date it may be assumed, without so determining, that each of these claimants might have replevied his shares from the Silver Leaf Company as having been transferred to them without authority."

In *Haggart v. Trusts and Guarantee Co. Ltd.*, 65 O.L.R. 23, Orde, J.A., approves of the position taken by Fisher, J.A., in *Re Bryant Isard & Co., Ex p. Fair*, saying in reference to the facts of that case (p. 27):—

"Here the very instrument of title delivered to Heron to implement the pledge is still intact, unencumbered by any charge

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either of Heron or of the bank. Heron has no property in it or in the shares it represents, and neither the certificate nor the shares can form any part of his bankrupt estate."

Under these circumstances, it seems unnecessary to me to pursue the questions arising before the actual bankruptcy, namely, as to the right of Wiggins Ltd. to pledge these Victory bonds and the effect of the tender made. The general law is that a broker can pledge securities, deposited with him as collateral to a purchase of stock, only for the amount due to him on the securities he pledges, subject of course to the terms of any special contract on the subject. In this case it is alleged that no such special contract exists. Without considering the matter, I would rest my judgment on what I believe to be an entirely satisfactory foundation, namely, that, when collateral security is deposited with a broker and is by him pledged to a bank for any sum, and the loan from the bank is entirely paid off, and at the same time the debt to the broker for which the collateral has been deposited, the rights of both the broker and bank are at an end, and the owner of the collateral is entitled to its return.

The appeal will be dismissed with costs.

I may perhaps in this case draw attention to the fact that the subject-matter of this application was not a sum of money but a tangible piece of property, as to which no right not represented by the trustee could intervene. The application therefore seems a natural and proper one to make in bankruptcy.

*Appeal dismissed with costs.*

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ROGERS V. FITZGERALD.

April 20.

*Attachment of Debts—Judgment Recovered by Person Injured by Automobile—Indemnity Provided by Policy of Foreign Insurance Company—Attachment of Indemnity-money—Amount Liquidated by Judgment—"Person within Ontario"—Rules 25(3), 590.*

The plaintiff, who had on the 26th November, 1929, recovered a judgment against the defendant F. for \$8,000 for personal injuries and damage to his property arising out of an automobile accident, obtained on the 31st December, 1929, an attaching order against the defendant insurance company based on a policy providing her with indemnity against the payment of damages for injuries to third persons and their property. The policy provided that "no recovery against the company by the assured shall be had hereunder until

the amount of loss or expense shall have been finally determined either by judgment against the assured after actual trial or by written agreement of the assured, the claimant, and the company, nor in any event unless suit is instituted within two years thereafter." The contract was made in the U.S.A. with a subject of that country:—

*Held*, that the claim under the contract of indemnity, upon the entry of the judgment in November, 1929, and on the taxation of the costs thereof, became a debt due by the defendant company to the defendant F. on or before the 31st December, 1929, and at that date the company (a foreign company) had to its credit in a bank in Ontario a large sum of money.

Clause (b) of Rule 590 did not apply, but clause (a) covered the case; and at the date of the attaching order there was a debt attachable in Ontario, and a "person within Ontario," who was "indebted to the judgment debtor," on the 31st December, 1929.

AN appeal by the plaintiff from the judgment of JEFFREY, J., determining an issue in favour of the defendant the Century Indemnity Company, and dismissing the action brought against that company and Fitzgerald for a declaration that the company owed an attachable debt to Fitzgerald.

March 23. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

A. B. Cunningham, K.C., for the appellant. When judgment was obtained against the defendant Fitzgerald, the appellant's claim became one for liquidated damages under the defendant company's policy of insurance. It is liquidated so far as both defendants are concerned. In addition, the policy contains an agreement on the part of the company to pay all costs taxed against the other defendant. The claim constitutes an equitable debt on the part of the company towards the other defendant, and as such is subject to attachment: *Jobin Marrin Co. v. Tyne* (1917), 11 O.W.N. 279; *McMulkin v. Traders Bank of Canada* (1912), 26 O.L.R. 1. The appellant has the same right to sue the insurance company as Fitzgerald might have had. The defendant might have sued in Ontario, even though the company is American and Fitzgerald lives outside of Ontario: 5 C.E.D. (Ont.), p. 378; *Boyd v. Robinson* (1891), 20 O.R. 404; *Hubert v. Township of Yarmouth* (1889), 18 O.R. 458; *Ferguson v. Gibson* (1872), L.R. 14 Eq. 379, at p. 386; *Lacey v. Hill* (1874), L.R. 18 Eq. 182, at p. 191; *In re Giles, Jones v. Pennefather*, [1896] 1 Ch. 956, at p. 961. A claim for indemnity lies notwithstanding that the insured has not paid: *Booth v. Trail* (1883), 12 Q.B.D. 8, at p. 10; Halsbury's Laws of England, vol. 15, p. 519.

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1931. The debt is not subject to attachment, because it is not ascertained.  
ROGERS Furthermore there are no moneys in Ontario available to satisfy  
v. the debt, if any. The moneys on deposit with the Canadian  
FITZGERALD. Government are assets within Ontario for a specific purpose, i.e.,  
for the benefit and protection of Canadian policy-holders. The  
equities between the defendants have not been tried out. No  
claim as between the defendant Fitzgerald and the company has  
been established, and that is a condition precedent to the recovery  
by the plaintiff from the company.

April 20. The judgment of the Court was read by HODGINS, J.A.:—Appeal by the plaintiff from the judgment pronounced by Jeffrey, J., determining an issue in favour of the Century Indemnity Company, and dismissing the action brought against that company by the appellant for a declaration that the company owed an attachable debt to its co-defendant.

The plaintiff, who had recovered a judgment for \$8,000 on the 26th November, 1929, against the defendant Anna Fitzgerald for personal injuries and damage to his property arising out of an automobile accident, obtained on the 31st December, 1929, an attaching order against the Century Indemnity Company of Hartford, Conn., U.S.A. This order was based on an insurance policy providing her with indemnity against the payment of damages for injuries to third persons and their property. On the company disputing its liability, an order directing an issue to be tried was made by the Local Judge at Kingston. The judgment now in appeal was upon that issue, which was expressed in these words, "What amount, if any, the garnishee must pay to the judgment creditor on account of the aforesaid judgment dated the 26th November, 1929."

But for one provision in the insurance policy, the appeal might be disposed of on the grounds set out in a judgment of Mr. Justice Middleton in *Carlino v. British Traders Insurance Co. Ltd.* (1927), 60 O.L.R. 162, namely, that "a claim to recover from an insurance company the amount of a loss (by fire) is not a debt or liquidated demand in money. . . . The plaintiff must prove the extent of his loss before he can recover."

The provision to which I refer is as follows:—

"F. Right of recovery. No recovery against the company by the assured shall be had hereunder until the amount of loss or expense shall have been finally determined either by judgment against the assured after actual trial or by written agreement of the assured, the claimant, and the company, nor in any event unless suit is instituted within two years thereafter."

A trial has taken place in the Supreme Court of Ontario at the Kingston Assizes, and the amount of the debt has become settled and ascertained thereby. As the policy itself, in consideration of an extra premium, is extended to cover damage to person and property arising out of the operation of the motor-vehicle, within the Dominion of Canada, a trial here might naturally be expected and is within the intention of the contract. But the policy further provides that the company agrees to pay "all costs taxed against the assured in any such proceedings," i.e. "of suits or legal proceedings arising therefrom," the last word referring to claims for injuries such as are insured against. The costs of the proceedings against Anna Fitzgerald in this Court have been taxed at the sum of \$495.60 by the Local Registrar at Kingston. Interest on the judgment and on the costs is also provided for.

Under these circumstances, the only question which remains is whether the Century Indemnity Company, a foreign company not until the 23rd March, 1929, licensed to do business in Ontario, can be sued here by way of garnishee proceedings. The contract is one made in the U.S.A. with a subject of that country. The insurance contract became operative before the 23rd March, 1929, but the judgment assessing the damages at \$8,000 and costs was not pronounced until the 26th November, 1929, when the company was licensed in Canada and had its head office in Canada, in Toronto, and the attaching order was made on the 31st December, 1929. It is sworn that the licence to do business here includes automobile accident insurance and that the company has \$388,800 deposited with the Receiver-General of Canada for the protection of Canadian policy-holders.

It also appears that there was \$26,367.74 in the Dominion Bank in Toronto to the credit of this company on the 31st December, 1929, which is the date of the attaching order. This fact is deposed to by R. W. Warwick, Senior Actuarial Examiner of the Department of Insurance in Ottawa, and his testimony is based on the annual statement of that date required by statute to be

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App. Div. furnished by British and foreign insurance companies other than  
1931. life insurance companies. No evidence was called by the company  
ROGERS to dispute Mr. Warwick's testimony. But these facts are not vital,  
v. as the Century Company appeared by counsel before the Local  
FITZGERALD. Judge at Kingston and attorned to the jurisdiction of this Court,  
Hodgins, by filing a defence to the issue delivered. The only question there-  
J.A. fore to be determined is whether at the date of the attaching order  
there was a debt, and, if there was, whether that debt is attachable  
here in Ontario.

I hold that the claim under the contract of insurance or indemnity, upon the entry of judgment after the trial and on the taxation of the costs thereof, became a debt or liquidated demand due by the company to Anna Fitzgerald on or before the 31st December, 1929, and that at that date the company had to its credit in Ontario some \$26,367.27.

Rule 25 (3) reads, "Service out of Ontario may also be allowed of an attaching order in cases falling within the provisions of Rule 590."

Rule 590 is as follows:—

"(1) The Court, upon the *ex parte* application of the judgment creditor, upon affidavit stating that the judgment is unsatisfied and

"(a) that some person within Ontario is indebted to the judgment debtor, or

"(b) that some person not within Ontario is indebted to the judgment debtor and that the debt to be attached is one for which such person might be sued in Ontario by the judgment debtor,

"may order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt and that the garnishee do at a time named shew cause why he should not pay the judgment creditor the debt due from the garnishee to the judgment debtor or so much thereof as may be sufficient to satisfy the judgment debt and the claims of any other execution creditors. Notice of the application to pay over shall, unless dispensed with, be given to the judgment debtor.

"(2) When the garnishee is not within Ontario, and is neither a British subject nor in British dominions, notice of the order and not the order itself shall be served.

“(3) Where a debt owing from a firm carrying on business within Ontario, but having members out of Ontario, is attached, service may be effected upon any person having control or management of the partnership business or any member of the firm within Ontario.”

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I do not think clause (b) applies here. Anna Fitzgerald could not have sued the insurance company here. But clause (a) covers this case. A “person” according to the Interpretation Act, R.S.O. 1927, ch. 1, sec. 31(y), includes any body corporate or politic, and this company in its policy describes itself as a “stock company,” and that document is signed by a president and secretary. Reference in the policy, as to the company’s authority to do insurance business, is made to secs. 112 and 113 of ch. 175 of the General Laws of the Commonwealth of Massachusetts. It may be interesting to note that by them, when a loss covered by the policy happens, the liability of the company becomes absolute, and that payment of the loss does not depend on the satisfaction by the assured of a final judgment against him, and that, on the recovery of a final judgment against the assured, the judgment creditor, if the insurance was in force when the accident happened, is entitled to have the insurance money applied to the satisfaction of the judgment.

By the same Act the word “company” includes “all corporations . . . engaged as principals in the business of insurance.”

It is sworn to by Warwick (*ante*) and not denied that the chief agent in Canada of the Century Indemnity Company resides in Canada, and that the head office in Canada is at 15 Toronto-street, Toronto. All these facts taken together are sufficient to warrant me in finding that there is a “person within Ontario” who “is indebted to the judgment debtor” on the 31st December, 1929.

The appeal should be allowed, and the trial judgment on the issue reversed, and judgment should be entered in favour of the appellant Rogers against the Century Indemnity Company for \$6,000 debt and interest thereon at 5 per cent. from the 26th November, 1929, and for \$495 for taxed costs with interest at 5 per cent. from the 26th December, 1929, together with costs of the issue and appeal.

*Appeal allowed.*

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RE PATTON.

April 23.

*Executors—Payment to Residuary Legatee of Moneys Available for Annuities Payable upon Conditions—Fulfilment of Conditions—Simple Interest Payable by Executors on Annuities Withheld—Negligent Conduct of Executors—Proceeding by Originating Motion—Rule 600(g)—Relief of Executors under sec. 34 of Trustee Act, R.S.O. 1927, ch. 150 — Executors Acting Honestly but not Reasonably.*

The right of the grandson of P. to the annuities payable, upon certain conditions laid down in P.'s will, to the grandson, was determined by the Privy Council in *Patton v. Toronto General Trusts Corporation*, [1930] A.C. 629. P. died on the 26th February, 1919. His grandson, then about 13 years of age, was then entitled, if the conditions were satisfied, to an annuity for life, and would also be entitled, subject to similar conditions, upon his father's death, to a further annuity for life. The father died on the 4th July, 1928.

Acting upon what they considered sufficient evidence that the conditions entitling the grandson to his annuity had not been satisfied, and upon their own interpretation of the will, the executors for several years ignored the possibility of the grandson ever establishing a claim to the annuity, and paid over to C., who herself was one of the executors and under the will was entitled to the residuary income, the moneys which, if the grandson were entitled, ought to have been paid to him. He came of age on the 5th January, 1927, and claimed from the executors payment of his annuity. The Privy Council decided in his favour as to both annuities, and he then made a claim to be paid interest by the executors:—

*Held*, upon an originating motion by the executors, that C.'s right to the money was so plainly doubtful that there could be no justification for paying it over to her.

Whether the matter is treated as an improper disposition of moneys belonging to the grandson, by paying them to C., or as an improper conversion by one of the executors of the money to her own use, the executors were negligent, and as a result of their negligence they made it impossible to put the moneys belonging to the grandson to any use for his ultimate benefit; and he was entitled to charge the executors with interest upon the arrears of both annuities, calculated at 5 per cent. per annum without rests.

*Quære*, whether a matter of this sort was properly the subject of an originating motion. But, as the executors had applied to the Court under Rule 600(g) for its opinion or advice, and no objection had been taken, the judgment might well be based upon that.

While the executors had acted honestly, it could not be said that they had acted reasonably, and sec. 34 of the Trustee Act could afford them no relief.

APPLICATION by the executors of the will of William Robert Patton, deceased, for an order determining a question arising in the administration of the estate of the deceased.

April 9. The application was heard by ORDE, J.A., in the Weekly Court, Toronto.

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*W. S. Montgomery*, for the executors.

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*Donald Macdonald*, for Annie Louise Carlyle.

*Charles Kappele*, for William Robert Patton, a grandson of the testator.

April 23. ORDE, J.A.:—This motion raises the question whether or not the executors are bound to pay to William Robert Patton, a grandson of the testator, interest upon the arrears of certain annuities given him by the will, payment of which was deferred by reason of the circumstances about to be explained.

The question of Patton's right to the annuities at all was not finally determined until the matter had been carried to the Judicial Committee of the Privy Council. The judgment of the Judicial Committee will be found in the report of *Patton v. Toronto General Trusts Corporation*, [1930] A.C. 629 (also noted 39 O.W.N. 5), and the judgments in our Courts in *Re Patton* (1929), 63 O.L.R. 655. These reports will serve to shew the nature of the issues involved in determining Patton's rights and the diversity of judicial opinion thereon. They also set forth certain facts which I need not repeat here.

The testator died on the 26th February, 1919. His grandson, who was then about 13 years of age, was then entitled, if the conditions laid down by the will were satisfied, to an annuity for life of \$500, payable quarterly, and would also be entitled, subject to similar conditions, upon his father's death, to a further annuity for life of \$1,500 payable quarterly. The father died on the 4th July, 1928.

I observe that in the Privy Council judgment it is stated that the father, Robert George Patton, died on the 28th January, 1928. This must be incorrect, as he made an affidavit for use in the Surrogate Court on the 6th February, 1928.

Acting upon what they considered sufficient evidence that the conditions entitling Patton to his annuity of \$500 had not been satisfied, and upon their own interpretation of the will, for several years the executors ignored the possibility of Patton's ever establishing any claim to the annuity, and paid over to Miss Carlyle, who under the will was entitled to the residuary income, the

Orde, J.A. moneys which, if Patton were entitled, ought to have been paid to  
1931. or held for him.

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Patton came of age on the 5th January, 1927, and a few weeks later claimed from the executors payment of the annuity bequeathed him by his grandfather's will. His claim remained unsettled until October, 1928, when the executors launched an originating motion to determine his right not only to the annuity of \$500 but also his right to the reversionary annuity of \$1,500 as from the death of his father, who had died on the 4th July in the same year. The proceedings upon that motion went ultimately to the Judicial Committee, where Patton succeeded in establishing his right to both annuities.

In accordance with that judgment, the executors have since paid Patton the principal of all the arrears of the two annuities, but have refused to pay him any interest thereon. This motion is made to determine that question.

It was stated on the argument that Miss Carlyle had repaid to the executors the principal of all sums which were improperly paid to her so as to enable the executors to pay the same to Patton. She appears by counsel on this motion to oppose Patton's claim, along with counsel for the executors, presumably because she may be under some liability to indemnify the executors in respect of any interest they may be required to pay Patton. I do not understand that any question as to her liability so to indemnify the executors is involved in this motion. Nor do I see how that question can affect the question of the executors' liability, if any, to Patton.

As a general rule, interest upon arrears of an annuity bequeathed by will is not chargeable against an executor. There is neither any contractual obligation on the part of the executor, nor any statutory liability to pay interest upon an unpaid debt, to serve as a foundation for the allowance of interest to the person entitled to the annuity. Interest is charged against an executor, broadly speaking, upon the ground that, having in his hands moneys or property which he has improperly withheld from the legatee or which he has converted to his own use, he must account to the legatee for the income or profit which he either in fact gained or ought to have gained by his wrongful or negligent disposition of the estate in his hands.

Lord Cranworth in *Torre v. Browne* (1855), 5 H.L.C. 555, at p. 578, after reviewing some of the earlier decisions, said: "The cases in which, in later times, the Court, in the absence of express contract, has allowed interest have been confined to those where the annuitant has held some legal security which, but for the interference of the Court, he might have made available for the obtaining of interest; or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay."

In *In re Honsberger, Honsberger v. Kratz* (1885), 10 O.R. 521, the late Chancellor Boyd discussed the principles upon which interest is chargeable against an executor.

Counsel for the executors strenuously argued that in the present case they were fully justified in believing that, upon their view of the meaning of the will and with the facts then before them, Patton could have no claim and that they might safely pay over to Miss Carlyle the moneys which, if their view were wrong, were unquestionably payable to Patton. I cannot accede to this argument. I find it impossible to understand how with the unusual provisions of the will before them they could have thought it safe to come to any final conclusion one way or the other as to Patton's right to the annuities. A decision upon that point depended upon the determination of certain questions of fact, questions which in their nature were quite out of the ordinary, and which could not possibly be determined with safety to the executors except by the courts or by admissions or releases from the parties affected. Patton was then an infant, and, having regard to the ruling of the Judicial Committee, it was hardly possible for the questions to be determined until he came of age. Whether in the circumstances the executors should have immediately come to the Court for a decision or for advice, or have waited until Patton came of age, withholding his annuity in the meantime, need not now be determined. Had they come to the Court, some order would have been made for their protection, and that would have been their prudent course. But, whether they chose to come to the Court immediately or to wait until Patton came of age, Miss Carlyle's right to the money was so plainly doubtful that there could be no justification for paying it over to her.

One feature of the matter which cannot be overlooked is that Miss Carlyle is herself one of the three executors, the other two

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Orde, J.A. being the Toronto General Trusts Corporation and Thomas W.  
1931. Carlyle, so that the payment to her ought not to be treated as if  
RE she were a beneficiary unfamiliar with the true state of the  
PATTON. accounts. As one of the executors, she is as much responsible in  
the eyes of the law for the improper diversion of the moneys available for the payment of the annuity as either of the other two.

Had the executors held the moneys either during Patton's minority or under the direction of the Court, pending a decision as to his rights under the will, the executors could not possibly justify the keeping of the money idle. The least they could do would be to get savings bank interest upon it. But during the period in question Government bonds, bearing interest at the rate of 5 per cent. per annum, and more, were available, or the moneys might have been paid into court upon a proper application for that purpose.

Whether the matter is treated as an improper disposition of moneys belonging to Patton by paying them to Miss Carlyle, or as an improper conversion by one of the executors of the moneys to her own use, I am forced to the conclusion that the executors must be held to have been negligent, and that as a result of their negligence they made it impossible to put the moneys belonging to Patton to any use for his ultimate benefit. Upon these grounds I think Patton is entitled to charge the executors with interest upon the arrears of his annuities, and that the interest must be calculated at the rate of 5 per cent. per annum from the dates when the respective instalments fell due under the provisions of the will. This applies both to the annuity of \$500 and to the reversionary annuity (as it has been called) of \$1,500 which accrued to him after his father's death.

In calculating the interest there should be no rests. In view of what the Chancellor said in the *Honsberger* case, 10 O.R. at p. 526, and of the judgment in *Inglis v. Beaty* (1878), 2 A.R. 453, I do not think the interest should be compounded.

Nothing was said as to a matter of this sort being the subject of an originating motion. As a rule the question arises in the course of an administration action. As liability to pay interest really falls personally upon the negligent executor, it may be that the question does not, strictly speaking, arise "in the administration of the estate or trust," within the meaning of para. (h) of Rule 600, notwithstanding that it may arise and be disposed of

when the Court is administering the estate under a judgment for administration. As the point was not discussed, I make no ruling upon it. The executors have applied to the Court for its opinion or advice under para. (g) of the Rule, and, no objection being taken, my judgment may well be based upon that.

No reliance was placed by the executors upon sec. 34 of the Trustee Act, R.S.O. 1927, ch. 150, which enables the Court to relieve trustees from personal liability for technical breaches of trust. While the executors have acted honestly, I cannot hold that they acted reasonably. In my view the section could afford the executors no relief.

As to the costs, I can see no reason why Patton should not get his costs from the executors. The executors' costs can doubtless be adjusted between themselves and Miss Carlyle in her personal capacity.

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## [IN CHAMBERS.]

REX EX REL. RIDGE V. LITTLE ET AL.

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April 24.

*Municipal Corporations—Election of Members of Township Council—Alleged Disqualification—Voting in Previous Year for Misapplication of Township Funds and for Borrowing Money in Excess of 80 per Cent. of Ordinary Current Expenditure—Municipal Act, R.S.O. 1927, ch. 233, secs. 314, 334.*

The relator appealed from an order of the Master dismissing a motion, made under Part IV. of the Municipal Act, for an order declaring that the four respondents, members of the municipal council of the township of S., were not duly elected to their respective offices, at the election held on the 1st January, 1931, upon the grounds: (1) that they had, in November, 1930, voted for the application of certain moneys contrary to the provisions of sec. 314 of the Act, by virtue of subsec. 3 of that section; and (2) because they had, in 1930, voted in favour of the council's borrowing sums in excess of 80 per cent. of the ordinary current expenditures of the township during 1929, together with the amount required for high and public school purposes for 1930, contrary to sec. 334 of the Act, by virtue of subsec. 3 of that section.

By an Act of the Legislature, 13 & 14 Geo. V. ch. 38, certain special powers were conferred upon the township by which the council was enabled to define and set apart certain areas of the township in which to establish and operate systems of waterworks, sewers, garbage-removal, etc., and in doing so to defray the cost and maintenance thereof, including any debentures issued therefor by the levying of taxes and rates upon the special areas so defined. There was also in existence, when that Act was passed, a Public Utilities Commission by which the Hydro-Electric system was operated for the township, which had been appointed under the then existing legisla-

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- tion, now embodied in sec. 33 *et seq.* of the Public Utilities Act, R.S.O. 1927, ch. 249:—
- Held*, that sec. 314, being a penalising section, must be strictly construed; the four respondents voted for a resolution that the township borrow from the Commission \$100,000 at 4½ per cent. per annum; but that resolution said nothing about the application of the money; and merely transferring surplus money from the Commission to the township would not necessarily be a misapplication of it.
- The second question really turned upon what was to be regarded as “ordinary expenditure for the next preceding year,” under subsec. 2 of sec. 334; and it was *held*, that those words were not restricted to the ordinary expenditures made out of the general rates, but included expenditures of a like character made in the operation of the township’s enterprises in the specially defined areas, notwithstanding that as a matter of bookkeeping such expenditures are charged against and paid for out of the special rates levied and collected from the special areas.
- Holmes v. Town of Goderich* (1902), 5 O.L.R. 33, distinguished.
- The relator, therefore, failed upon both grounds, and his appeal was dismissed.

AN appeal by the relator from the order of the Master of the Supreme Court dismissing a motion made under Part IV. of the Municipal Act, R.S.O. 1927, ch. 233, for an order declaring that the four respondents were not duly elected to the respective offices of reeve, first deputy-reeve, second deputy-reeve, and third deputy-reeve, of the Township of Scarborough, at the election held on the 1st January, 1931.

April 7 and 8. The appeal was heard by ORDE, J.A., in Chambers.

*Shirley Denison*, K.C., and *D. P. MacDougall*, for the relator.  
*D. L. McCarthy*, K.C., and *H. E. Beckett*, for the respondents.

April 24. ORDE, J.A.:—The grounds upon which the motion was based were:—

1st. That the respondents were disqualified from holding such offices because they had, in or about November, 1930, voted for the application of certain moneys contrary to the provisions of sec. 314 of the Act, by virtue of subsec. 3 of that section.

2nd. That they were likewise disqualified because they had during the year 1930 voted in favour of the council’s borrowing sums in excess of 80 per cent. of the ordinary current expenditure of the township during 1929, together with the amount required for high school and public school purposes for the year 1930, contrary to the provisions of sec. 334 of the Act, by virtue of subsec. 3 of that section.

After hearing evidence, the learned Master dismissed the motion, and the relator now appeals.

The appeal was argued at some length before me, but I think that it falls to be determined upon very simple grounds.

By an Act of the Legislature, 13 & 14 Geo. V. ch. 88 (1923), which superseded an Act passed in 1918, 8 Geo. V. ch. 81, certain special powers were conferred upon the Township of Scarborough by which the council was enabled to define and set apart certain sections or areas of the township in which to establish and operate a system or systems of waterworks, and a system or systems of sewers, and also for the removal of ashes, garbage and refuse, the licensing of dogs, and the erection and maintenance of fire-halls, and in doing so to defray the cost and maintenance thereof, including any debentures issued therefor, by the levying of taxes and rates upon the special areas so defined. This legislation thus enabled the council to place the burden of special municipal works and services upon the ratepayers directly benefiting therefrom and so that the general rates over the whole township were exempt.

There was also in existence when the foregoing special legislation was passed a Public Utilities Commission by which the Hydro-Electric system was operated for the township, which had been appointed under the then existing legislation which is now embodied in sec. 33 *et seq.* of the Public Utilities Act, R.S.O. 1927, ch. 249.

Dealing now with the first ground: sec. 314 declares that if the council applies any money raised for a special purpose or collected for a sinking fund in paying current or other expenditure the members who vote for such application shall be personally liable for the amount so applied, and by subsec. 3 the members so voting are disqualified from holding any municipal office for two years.

On the 3rd November, 1930, the council passed a resolution in the following words: "Moved by Mr. T. H. Sanders, seconded by Mr. Frank Blanchard: resolved that Scarborough Township borrow from the Scarborough Utilities Commission the sum of \$100,000 at 4½ per cent. per annum." There is no record as to who voted for or against this. It was recorded by the reeve, the respondent Little, as carried, and, as the respondents Sanders and Blanchard moved and seconded it, it is a reasonable presumption that they voted for it. The evidence of the township clerk is that all five members were present, and that one, Mr. Linden, who is

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Orde. J.A. not a respondent, opposed it, though his dissent is not recorded.  
1931. From the evidence it would appear that the Public Utilities  
Commission had accumulated a surplus of about \$123,000, and,  
RIDGE being anxious to get a good rate of interest, and knowing the  
v. township was borrowing money, suggested lending \$100,000 to  
LITTLE the township as a call-loan at 4½ per cent. The money was  
ET AL. advanced, and was paid into the township's bank and was used to  
meet certain local improvement obligations of the township.

There was a great deal of argument for and against the suggestion that the moneys of the Utilities Commission belonged in reality to the township and were therefore moneys "raised for a special purpose" within the meaning of sec. 314. If it were clear that the respondents had in fact voted for the application of the moneys in question in paying current or other expenditures, that is in using the moneys for some purpose other than the special purpose for which they had been raised, I should be inclined to hold that the section was wide enough to include moneys of this character, notwithstanding that they were in the hands of the Commission.

But I think the objection taken by Mr. McCarthy is well founded, namely, that it must be proved that the respondents voted for the misapplication of the money, and that that has not been done. The section is a penalising one, and I think that it must be strictly construed. It is clear that the four respondents voted for the resolution above quoted, but that resolution merely authorised the borrowing of \$100,000 from the Commission. It says nothing about the application of it; and, whatever the understanding or intention may have been as to its expenditure, there is nothing to shew that the respondents or any of them at any time voted for any particular application of the moneys whatever. The use to which it was put may have rested with the township treasurer. Merely transferring the surplus money from the Commission to the township would not necessarily be a misapplication of it.

I think, therefore, that the appeal upon the first ground fails.

The second ground is based upon the provisions of sec. 334. By that section the council is empowered to borrow "such sums as the council may deem necessary to meet the current ordinary expenditure of the corporation, and the sums required to be raised in the current year for High School and Public School purposes until the taxes are collected." By subsec. 2, the amount to be so

borrowed must not exceed, in addition to the amount which may be borrowed for school purposes, 80 per cent. of the "ordinary expenditure for the next preceding year."

By subsec. 3, every member who voted for the borrowing of a sum in excess of the limit so fixed is disqualified from holding any municipal office for two years.

I do not think it is necessary to go into all the figures which were discussed in detail during the argument. The question really turns upon what is to be regarded as "ordinary expenditure for the next preceding year" under subsec. 2.

In calculating the total ordinary expenditure for the year 1929, up to 80 per cent. of which the township might borrow, the treasurer included all expenditure for maintenance, etc., of the works and other municipal requirements in the special sections or areas already referred to, such as sewers, fire department, garbage removal, etc. If this expenditure is to be regarded as ordinary expenditure, then Mr. Denison admitted that the limit had not been exceeded, but he contended that the words "ordinary expenditure" must be restricted to such expenditure as would be made out of the general rates applicable to the whole township, and did not include those expenditures, ordinary though they might be in character, which were made out of the special rates levied against those ratepayers in the special areas.

If this argument were sound, it would lead to this extraordinary result. The taxes in Scarborough for the year are not collected until December. If the council must depend upon the taxes from the special areas to meet the necessary expenses of the particular works which they are to pay, and cannot borrow against them at all—and that was Mr. Denison's contention—then the wages and salaries of the corporation's employees engaged upon those particular works, such as firemen, garbage-collectors, inspectors, and others engaged upon the water and sewer systems, would have to go for eleven months unpaid, to say nothing of the necessity for meeting interest and sinking fund on debentures. It is quite clear that civic employees engaged upon the special works in the defined areas would be entitled to sue the township for their salaries or wages and to get a judgment at large therefor, and to enforce that judgment as any other judgment creditor of the township might.

The only authority cited by Mr. Denison in support of his argument was *Holmes v. Town of Goderich* (1902), 5 O.L.R. 33.

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Orde, J.A. I cannot see how the case applies here. The question there did  
 1931. not involve any consideration of what constituted the ordinary or  
 REX EX REL. current expenditure for the preceding year. What was held was  
 RIDGE that after the estimates for the current year had been determined  
 v. and the rate to meet them had been struck, an outlay which was  
 LITTLE not contemplated could not be regarded as part of the current  
 ET AL. ordinary expenditure for that year for the purpose of borrowing  
 money to meet it.

In the absence of some authority to the contrary, I am of the opinion that the words "ordinary expenditure" in subsec. 2 of sec. 334 are not restricted to the ordinary expenditures made out of the general rates, but include expenditures of a like character made in the operation and maintenance of the township's enterprises in the specially defined sections or areas, notwithstanding that as a matter of bookkeeping such expenditures are charged up against and paid for out of the special rates levied and collected from the special areas.

Any other conclusion would paralyse the administration of the township. Mr. Denison argued that the only remedy would be special legislation. But I cannot believe that the Legislature intended the words in subsec. 2 to have any such restricted meaning.

The appeal fails upon the second ground also.

The appeal will therefore be dismissed with costs payable by the relator.

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[LOGIE, J.]

1931.

BARTLETT V. OSTERHOUT.

April 24. *Crown—Judgments Obtained by, against Mortgagor of Land—Executions Placed in Sheriff's Hands—Addition of the King and the Attorney-General as Parties in Master's Office—Submission to Ordinary Procedure of Court—Liability to be Foreclosed—Execution Act, R.S.O. 1927, ch. 112.*

In a mortgage action, the King and the Attorney-General for Canada were added as parties in a Local Master's office, as subsequent encumbrancers in respect of executions against the mortgagor upon judgments recovered for income and sales taxes. The Local Master reported that he had refused to foreclose the added parties, and the plaintiffs appealed from his report:—

*Held*, that the Crown was not in any sense the owner of the equity of redemption; and, having submitted itself to the ordinary rules of procedure in an action, by recovering judgment and issuing execution for Crown debts, could be foreclosed in another action as an ordinary execution creditor of the mortgagor.

Although a mortgagee is liable in certain cases to have his security postponed to the claims of the Crown by virtue of its prerogative, the Crown, even when claiming under an extent, is as a judgment creditor subject to prior equities and to such encumbrances as its debtor has lawfully created.

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The prior security of the plaintiffs should prevail against the Crown, and the Crown, having submitted itself to the Court, should be foreclosed.

AN appeal by the plaintiffs from the report of the Local Master at Sandwich.

The appeal was heard by LOGIE, J., in the Weekly Court, Toronto.

H. L. Barnes, for the plaintiffs.

F. A. Landriau, for the defendant the Attorney-General for Canada.

April 24. LOGIE, J.:—The report of the Local Master is dated the 12th February, 1931; he refuses to foreclose his Majesty the King in the right of the Dominion of Canada (*sic*), in the matter of the Income Tax Act, 1917, and amendments thereto, and the Attorney-General for Canada, as subsequent encumbrancers in respect of executions against Osterhout upon judgments recovered for income and sales taxes. The income and sales taxes accrued due and the judgments therefor were recovered subsequent to the plaintiffs' mortgage.

The Attorney-General, when suing or being sued in his official capacity, is by virtue of his office suing or sued as representing the Crown: *Smith v. Attorney-General for Ontario* (1922), 52 O.L.R. 469; *Attorney-General for Ontario v. Russell* (1921), 49 O.L.R. 103.

There is no question here as to the Crown's title to the land. The Crown is not the owner of the equity of redemption, but is a subsequent encumbrancer, its claim being subsequent to the plaintiffs' mortgage; thus distinguishing the case at bar from *Dunn v. Attorney-General* (1864), 10 Gr. 482, where the Crown held the equity of redemption. It has been served with notice T., and does not choose to redeem, or even file a claim.

The Crown in an action which it institutes itself, subject to certain exceptions not arising here, submits itself to all the ordinary rules of practice and procedure: *Regina v. Grant* (1896), 17 P.R. 165; *Regina v. "The City of Windsor"* (1896), 5 Can. Ex. C.R. 223 (an Admiralty suit). And the question is whether,

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having so submitted by recovering judgment and issuing execution for Crown debts, it can be foreclosed in another action as an ordinary execution creditor of the mortgagor.

There can be no doubt that, where the Crown in the right of the Dominion has rights or liabilities, those rights and liabilities are to be ascertained according to the laws of the Province in which the cause of action arose as they existed at the time such rights arose or such liabilities were imposed: *Gauthier v. The King* (1918), 56 Can. S.C.R. 176, at pp. 179, 180; *Black v. The Queen* (1899), 29 Can. S.C.R. 693; *Ross v. The King* (1902), 32 Can. S.C.R. 532; *Regina v. Henderson* (1898), 28 Can. S.C.R. 425.

In the case at bar, there being no question of priorities between creditors, the Crown's rights arose under and are confined to the four corners of the Ontario Execution Act, R.S.O. 1914, ch. 80, and R.S.O. 1927, ch. 112.

Under these Acts a writ of execution, subject to the provisions of the Land Titles Act, binds the land from the time of delivery thereof to the sheriff for execution, and the sheriff to whom an execution against the lands and tenements of a mortgagor is directed may seize, sell, and convey all the interest of the mortgagor therein, subject to the mortgage.

The Crown was not by virtue of its execution the owner in any sense of the equity of redemption, as argued by Mr. Landriau; it simply had the right to recover its money from its debtor's lands if it could; and, although a mortgagee in certain cases is liable to have his security postponed to the claims of the Crown by virtue of the latter's prerogative, the Crown even when claiming under an "extent," is as a judgment creditor subject to prior equities and to such encumbrances as the debtor has lawfully created: *Casberd v. Ward* (1819), 6 Price 411; *Rex v. Lee* (1819), 6 Price 369; *Giles v. Grover* (1832), 1 Cl. & F. 72.

The prior security of the plaintiffs will prevail against the Crown, and the Crown, having submitted itself to the Court, will be foreclosed.

For this purpose the report is referred back to the Master to make the appropriate changes and amendment.

Costs of the appeal to be paid by the Attorney-General for Canada.

## [APPELLATE DIVISION.]

BOYD v. SMITH.

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May 1.

*Negligence—Motor-vehicle upon Highway—Injury to Child—Negligence of Driver—Vehicle in Possession of Driver without Consent of Owner—Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 41—Whether Employer of Driver Liable—Use of Vehicle outside Scope of Employment.*

The judgment of RANEY, J. (1930), 66 O.L.R. 137, was affirmed as regards the dismissal of the plaintiffs' claim against the defendant C., and reversed as to the finding that the defendant company was responsible for the negligence of the defendant S. which caused injury to the plaintiffs.

S. was driving C.'s car without C.'s authority when the act of negligence occurred, and C. was relieved from liability by the provisions of the Highway Traffic Act, sec. 41.

Whether or not as a fact S. was acting within the scope of his employment when he went to the premises of a customer of the defendant company, his employer, respecting some work which the customer desired the defendant company to do, his use of a dangerous vehicle for the purpose was outside the scope of his employment, and was the cause of the disaster.

*Stretton v. City of Toronto* (1887), 13 O.R. 139, approved and followed.

AN appeal by the defendant Permanent Records Corporation Ltd. and a cross-appeal by the plaintiffs from the judgment of RANEY, J. (1930), 66 O.L.R. 137.

February 4 and 5. The appeal and cross-appeal were heard by LATCHFORD, C.J., RIDDELL, MASTEN, and FISHER, J.J.A.

R. S. Robertson, K.C., for the appellant corporation, argued that Smith was not acting within the scope of his authority when going for the work; but, even if he was so acting, he took, without the knowledge or consent of the appellant company, the automobile which caused the damage when going upon that errand; and therefore the appellant company was not liable: *Stretton v. City of Toronto* (1887), 13 O.R. 139; *Coll v. Toronto Railway Co.* (1898), 25 A.R. 55; *Englehart v. Farrant & Co.*, [1897] 1 Q.B. 240.

J. R. Cartwright, for the plaintiffs, respondents and cross-appellants, contended that as to the claim against the company the findings of the learned trial Judge were correct, and the case was governed by *Bayley v. Manchester Sheffield and Lincolnshire Railway Co.* (1872), L.R. 7 C.P. 415. Reference also to *Dishman v. Whitney* (1922), 209 Pac. Repr. 12; *Gibson v. Dupree* (1914), 144 Pac. Repr. 1133; *Continental Casualty Co. v. Yorke*, [1930] S.C.R. 180. Upon the cross-appeal there should be judgment against Carter, who left the car under control of his wife; consent

App. Div. to Smith using it should be implied from the circumstances in  
1931. evidence.

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Smith.

May 1. RIDDELL, J.A.:—This is an appeal and a cross-appeal from the judgment of Mr. Justice Raney at the trial without a jury at Toronto.

We may not be quite satisfied that the full story was given at the trial, or that such part as was told was given in strict accordance with the actual facts; but we have no right to give effect to suspicion—our duty is, as was that of the trial Judge, the same as that of a jury, “a true verdict” to “give according to the evidence.”

Examining the evidence, we find that the following are the facts as sworn to, without contradiction.

The defendant the Permanent Records Corporation Ltd. is a joint-stock company with directors; its business was the making of photographs on metal by a patented process. The defendant Carter was the vice-president and technologist, apparently acting as manager, but with no power to engage or discharge employees. Smith, the other defendant, was employed by the company as a photographer; he did not go out for work, but whatever work was brought in he photographed in the office of the company. He was the brother of Carter's wife; and the two families lived in adjoining apartments. Carter went to England in May, 1928, leaving his wife in their apartment. He had an automobile; Smith had never driven it, and, indeed, was not qualified to do so, as he had no licence. When Carter went to England, he left the automobile behind with directions to his wife that one Pipe, a former employee of the company, who was a qualified driver, and who had driven her in the car before, might take her out in the car at any time and also teach her to drive—that is all he told her about the car. The car was in the garage at Carter's, and the keys hung in Carter's apartment.

Smith, the brother of Mrs. Carter, took the car out on his own affairs a dozen times or so, Mrs. Carter objecting several times, telling him that he should not, and never giving him the car to take out.

It seems important to inquire as to the position of Smith in the company, as, in my view, the judgment of Mr. Justice Raney was, at least in part, based upon a misapprehension as to what

Smith actually swore to—a mistake, be it said, participated in by the able counsel for the plaintiffs. The learned Judge says that Carter, on going to England, left Smith in charge of the company's operations. Were this the fact as established in evidence, it might have an important bearing upon the result, but there is absolutely no evidence to support the statement. What Smith says is that he was not in charge of the company when Carter was away, that "Mr. Irwin and Mr. Mooney" were "in charge of the company at his office," but that he was "the only one at work," "was there alone," and in charge of the premises. There is no evidence to connect him with the company in any other capacity than that of a workman, who did what work was brought in, but did not go out to seek it; nor is there any evidence that going for proposed work came in the least within the scope of his authority. He swears that it did not, and there is no contradiction.

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This being the condition of affairs, Smith left the works one day for luncheon, locking up the works. When he reached home, his sister told him that the International Silver Company had telephoned her that they had been telephoning the works, as they had some work they wanted done, but got no answer, and consequently telephoned her that they had some work which they would send down by a boy to the works. The learned trial Judge suggested that she had said that these proposed customers wanted to see him—but the witness does not accede to the suggestion, saying that what she said was, "They had some work." She swears that she told him that they said that they had a picture and would send a boy down with it. Instead of telephoning the proposed customers or going down to the works to receive the picture and attend to the job, Smith, without any suggestion from his sister, determined to go and get the picture. This, he swears, was not "within the scope of" his duty—"No, sir, my duty was that of a photographer, myself;" and there is no contradiction or evidence indicating a different state of affairs.

It was raining; he went out of the house on foot without any indication that he was going to take the car, but saying that, as he had plenty of time, he would go and get the picture; Mrs. Carter had no knowledge or notice that he was going to take the car; he took the car, and, running it negligently, caused the accident which is the basis of this action.

That Smith is liable is not disputed by any one—he has already

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1931. the learned trial Judge held that the company was also liable,  
and the co-defendant, Carter, was not.

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Smith.

The company appeals, and the plaintiffs also appeal against Carter.

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Dealing first with the appeal of the plaintiffs, it is quite clear that Mrs. Carter was a bailee of the car, on the special terms stated by her husband, and that she had no right to allow Smith to have the car, even if she so desired; she had no right to act in respect of it in a way not authorised by the bailor: Halsbury's Laws of England, vol. 1, p. 534; and one who deals with a bailee does so at his own peril. But she did not consent, even tacitly—she did not, and gave no intimation that she would, permit him to take the car. The learned Judge then was right in holding that the car at the time of the accident was in Smith's possession "without the owner's consent;" consequently Carter is relieved from liability by the provisions of the Highway Traffic Act as it stood at the time, R.S.O. 1927, ch. 251, sec. 41. The appeal of the plaintiff against Carter, therefore, fails and must be dismissed with costs.

There is no room for doubt as to the principles upon which the liability of the company is to be determined. The learned Judge quotes and relies upon *Bayley v. Manchester Sheffield and Lincolnshire Railway Co.*, L.R. 7 C.P. 415, at p. 420, where it is said:—

"A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from caprice of the servant, but in the course of his employment."

That this is a correct statement of the law cannot be and never has been disputed; and it is sufficient to dispose of this case.

Had it not been for a misapprehension of the position of Smith and the idea that he was "in charge of the company's operations," it is probable that the judgment would have been in

the opposite sense—it may well be that the manager of a company, having been given control of its operations, has the power to do anything he sees fit in what he conceives to be the interest of the company, and can render his company liable for any act of his so done. But that is not the present case—Smith was, indeed, put in the place of the company “to do a class of acts in” its absence; but that class of acts was well defined—he was to photograph whatever work was brought into the office to be done, not to go out for the work himself. In addition, he was, in the absence of Carter, to look after the premises of the company. Everything he had to do—everything he was engaged to do—every class of acts he was to do—was to be done at the office of the company. He took it upon himself to do another class of work entirely, which called him away from the office; and it is, I think, impossible to hold that, when so engaged, he was performing an act within the class of acts he was placed by the company to perform.

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That Smith thought—if he did think—that his going in his own time for work would be for the advantage of the company, is *nihil ad rem* and wholly unimportant: *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526, at p. 536, *per* Wightman, J., and (p. 542) *per* Blackburn, J.

The law in this regard is so fully, clearly and accurately set out in Beven on Negligence, 4th ed., pp. 719 *et seq.*, that there is no need to say more concerning it.

Even supposing that, when the accident took place, Smith could be considered as acting within the scope of his authority so far as going for the work is concerned, still the company would not therefore be liable.

In *Stretton v. City of Toronto*, 13 O.R. 139, an employee of the city had been sent for a wrench to use in his work—this clearly would be an act within the scope of his authority; in the execution of this duty, he, without the knowledge or consent of his employers, wrongfully took possession of a horse and buggy belonging to another employee of the city, and drove so negligently that he ran the plaintiff down. In an action brought against the city, the Court (Wilson, C.J., Armour and O'Connor, JJ.) said:—

“Bessey, it is true, was the servant of the defendants, and in going for the wrench was acting in the course of his employment;

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but he was not acting in the course of his employment in going for it with a horse and buggy which he had wrongfully possessed himself of without the knowledge or consent of the defendants, and they were consequently not liable for his negligent driving of this horse and buggy."

This decision was, of course, binding upon the trial Judge, and, no doubt, he would have followed it but for his misapprehension of the position of Smith in respect to the company.

It will be seen that this case is simply a special application of the general principles already referred to; it is, in my view, well decided, and we should follow it.

I am therefore of the opinion that the appeal of the company should be allowed with costs and the action against it dismissed with costs.

MASTEN, J.A.:—This action is for damages claimed by each of the plaintiffs in consequence of injuries to the infant plaintiff by a motor-vehicle driven by the defendant Smith. The defendant Smith did not defend the action, and the present appeals are between the plaintiffs and the defendants Carter and the Permanent Records Corporation Ltd. In the Court below the action against Carter was dismissed and the plaintiffs' claim against the defendant company allowed.

With respect to the appeal of the plaintiffs seeking to make the defendant Carter liable, I agree with the conclusion of the learned trial Judge. It is manifest from the evidence that Carter did not authorise Smith to use his car and gave specific instructions before leaving for England that if his wife desired to go out in the car she was to employ one Pipe as a chauffeur, and no authority was given to Mrs. Carter to authorise any one else to drive Carter's car. The plaintiff's appeal must therefore be dismissed.

On the argument before this Court extended discussion was had on the question as to whether Smith was acting in the scope of his employment when he went to the premises of a customer of the defendant company in connection with a telephone message respecting some work which the customer desired the defendant company to do.

The principle or rule of law with respect to the responsibility of a principal for the negligence of his servant has long been settled and fully defined. No attack on the rule of law is urged

in the present case, which turns wholly on the application of the settled principle to the circumstances of the present case. Recent authorities afford illustrations of the application of the principle to various states of facts, but do not modify or vary the well established rule. The question therefore turns entirely on the view which the Court takes of the circumstances appearing in evidence.

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Upon a careful consideration of these circumstances, I am of the opinion that the defendant Smith, when he went to the premises of the customer of the defendant company, was acting within the scope of his employment. It was to the advantage of the employer and in reasonable fulfilment of the functions of the defendant Smith as an employee of the defendant company. This is purely a conclusion of fact on the circumstances shewn in evidence.

I am, however, of opinion that, though Smith's errand was entered upon in the scope of his employment, still the employer is not liable. The accident occurred because Smith, without the knowledge or concurrence of the defendant company, wrongfully took possession of Carter's motor-car and proceeded to drive himself in it to the office of the customer. He had no licence to drive, was an inexperienced and incompetent driver, and the illegal taking out of this dangerous machine without the knowledge of the company and attempting wrongfully to drive it on the public highway was contrary to Smith's duty as an employee of the defendant company and was outside the scope of his employment. The *causa causans* was the driving of the car.

This case is on all fours with *Stretton v. City of Toronto*, 13 O.R. 139, with which decision I entirely agree.

The appeal of the defendant company should be allowed with costs and the action dismissed with costs.

LATCHFORD, C.J., and FISHER, J.A., agreed with MASTEN, J.A.

*Appeal allowed and cross-appeal dismissed.*

## [APPELLATE DIVISION.]

1931.

MILES V. ZUCKERMAN.

May 1.

*Guaranty—Document Signed by President of Company—Whether Personal Guaranty of Company's Debt—Statute of Frauds.*

AN appeal by the defendant from the judgment of LOGIE, J. (1930), 66 O.L.R. 205, was dismissed, the Court (composed of four Judges) being divided in opinion.

*Held*, by LATCHFORD, C.J., and FISHER, J.A., that the document was a personal guaranty of the debt by the defendant as an individual; and by RIDDELL and MASTEN, J.J.A., that the signing of his name by the defendant to a document purporting to verify the contract of the company could not be regarded as a signing by him sufficient to make the document his contract within the Statute of Frauds.

AN appeal by the defendant from the judgment of LOGIE, J. (1930), 66 O.L.R. 205.

February 5, 1931. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and FISHER, J.J.A.

*I. Levinter*, for the appellant, argued that the signature to the document in question was not that of the defendant, but was that of the company: *In re Barnard* (1886), 32 Ch. D. 447; *Chapman v. Smethurst*, [1909] 1 K.B. 927. The "I" appearing in the body of the document was not conclusive evidence that the individual signatory was meant thereby. The intention of the party signing is what governs, and the evidence is against the contention that it was a personal guarantee of the defendant: *Katzman v. Ownahome Realty Co.*, [1924] S.C.R. 18; *Ex p. Buckley, In re Clarke* (1845), 14 M. & W. 469; *Elliott v. Bax-Ironside*, [1925] 2 K.B. 301; *Imperial Bank of Canada v. Nixon* (1926), 59 O.L.R. 538. The document is not a binding guarantee. It does not comply with the Statute of Frauds in shewing who is to be guaranteed: *Coombs v. Wilkes*, [1891] 3 Ch. 77; *Skelton v. Cole* (1857), 1 DeG. & J. 587; *Madden v. Cox* (1880), 5 A.R. 473. There being no ambiguity in the letter, oral evidence was inadmissible to vary it.

*J. L. Cohen*, for the plaintiff, respondent, contended that the document was a personal guarantee of the defendant, and was so intended. The learned trial Judge was right in admitting oral evidence, as the letter was ambiguous: *Young v. Schuler* (1883), 11 Q.B.D. 651; *Canadian Welsh Anthracite Coal Co. Ltd. v. Pember* (1927), 32 O.W.N. 75; *Fairchild v. Ferguson* (1892), 21 Can. S.C.R. 484. On the question of personal guarantee, reference was made to *United States of America v. Motor Trucks Ltd.*,

[1924] A.C. 196; Phipson on Evidence, 7th ed., p. 583; *Chapman v. Smith*, [1907] 2 Ch. 97; *Universal Steam Navigation Co. Ltd. v. James McKelvie & Co.*, [1923] A.C. 492. The letter was a binding guarantee.

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May 1. LATCHFORD, C.J.:—This appeal is from the judgment of Logie, J., of the 13th October, 1930, awarding the plaintiff \$3,721.15 and costs.

The material facts are set forth in the reasons for judgment of the learned trial Judge, and need to be but slightly supplemented.

The plaintiff's contract with City Builders Ltd., of which Zuckerman was president, was found to have been almost completed when, on the 6th April, 1929, the company addressed an order to the London Life Assurance Company, which had made it a mortgage loan. The order, so far as material, was in the following words:—

"Gentlemen:—Re Rusholme Drive Loans. Please be advised that we wish to retain \$3,600 in favor of W. H. Miles to come out of the last draw on the above mortgages. Yours very truly, City Builders Limited. Chas. Zuckerman, president,

"Harry Penny, secretary-treasurer."

The order was delivered to the plaintiff, and on the same date a letter was addressed to Miles:—

"Dear Sir:—Re Rusholme Drive job.

"I am herewith enclosing a letter to the London Life Assurance Co. for \$3,600, which makes it \$300 per house.

"However, should you hold this order about fifteen days we will be able to forward you a cheque in return for this order.

"Should you want any further information kindly make an appointment through the telephone, as the writer would like to have an interview as to the above.

"Trusting this will meet with your approval and thanking you for past favours, we are,

"Yours very truly,

"City Builders Limited

"C. Zuckerman, Pres."

Several conversations ensued by telephone between the defendant and the plaintiff and the plaintiff's book-keeper, Miss McKinney. In one of these Zuckerman asked the book-keeper if she had seen the order. She answered that it was on her desk. He

App. Div. then said—he was very polite at the time—“Please tell Mr. Miles  
1931. to please hold that order, not to present it, as I am going to give  
MILES him a personal guarantee for the amount.”  
v. “His Lordship: Please not to present the order, as I am going  
ZUCKERMAN. to give my personal guarantee—  
Latchford, “Voice from the court-room, ‘This is a lie, your Lordship.’  
C.J. “His Lordship: Who is that man? Is he your client, Mr.  
Luxenberg?

“Mr. Luxenberg: “Yes, your Lordship.”

Politeness as a garment had fallen away from Mr. Zuckerman at this stage; and to shew him, as she declared, that she was not lying, Miss McKinney deposed to what passed when later—probably next day—he came to the plaintiff’s office. Mr. Miles, she said, was insisting on payment and Zuckerman said to him: “Well! what need you worry? You have my letter with my personal promise in it; you will get every cent of your money—why worry about it?”

This and similar evidence was objected to, but admitted—I think quite properly. His Lordship observed in regard to certain testimony of the plaintiff: “This is directed towards consideration. The consideration is the forbearance to forward the order which the man had got.”

“Mr. Luxenberg: “Yes, my Lord, I admit the consideration.”

The letter referred to is that of the 11th April:—

“Dear Sir: Confirming (confirming is meant) our telephone conversation of yesterday I beg to state that I shall personally see to it that you get your payments regularly as per contract.

“Trusting that this is entirely to your satisfaction.

“Yours very truly,

“City Builders Limited,

“per C. Zuckerman.”

“Terms of payment as per contract” were that City Builders was to give Miles an order on the loan company, the London Life Assurance Company, such as was given for the \$3,600, for 75 per cent. of the contract on each house; balance to be arranged with notes or securities satisfactory to Miles. I infer that \$3,600 was 75 per cent. of the value of the work done and remaining unpaid for when the order was given.

No reliance was placed, in the argument at bar, on the defence pleaded that time given by Miles to Zuckerman’s company dis-

charged the defendant as surety, if he was surety. The only effect of the time which Miles was prevailed upon to give was that he lost his right to register liens against the lands on which he had performed his contract and Zuckerman's company was bankrupt.

In the view I take of the letter of the 11th April, it is unnecessary to enter into a discussion of the law regarding the rights and liabilities of a guarantor. True the word "guarantee" was freely used in discussion between the parties relative to the withholding of the order. But what it was understood by both Miles and Zuckerman to mean was that the defendant, for an admitted consideration of the value of \$3,600, was personally undertaking to pay the plaintiff all that his company would owe upon the contract when completed. That is what I take the letter to mean notwithstanding the appendage to it of the words "City Builders Limited" and "per."

A circumstance not without significance is that in the three documents in evidence, which were letters written to Miles on behalf of the company—that of the 21st December, 1928, accepting the tender, the order on the mortgagees, and the letter to the plaintiff of the 6th April—the defendant, under the name "City Builders Limited," signed as "Pres." or "President" of his company; while in the letter of the 11th April no addition is made to his signature—evidence indicating that he was binding himself.

Much more directly in point appears in the letter.

The person who so conversed with the addressee was the writer and signatory, C. Zuckerman. Neither the first nor the second "I" can be Builders Limited; but both can be and plainly are intended to refer to the person of the writer. What does "I," that is Zuckerman, "beg to state"? This, "I," that again is Zuckerman, "will personally see to it that you get your payments." The promise made "yesterday" by Zuckerman was that, if the order was withheld, he as a man of reputed substance would personally pay Miles. That undertaking is what the letter was intended to be, and is, evidence of. Considered in any other respect, it is inconsistent with itself, meaningless, and open, moreover, to the imputation that it was designed to enable Zuckerman to swindle the unwary and trusting plaintiff.

Anything appearing in the letter inconsistent with the construction which in my opinion it was intended to bear—what it

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was certainly accepted as bearing—should be struck from it. All that is self-contradictory and meaningless should be rejected and effect given to what was plainly intended. *Res magis valeat quam pereat* should be said of the letter.

The appeal should be dismissed with costs.

RIDDELL, J.A.:—An appeal by the defendant from the judgment of Mr. Justice Logie at the trial.

The plaintiff in his statement of claim alleges that the defendant, for valuable consideration, which he sets out, “promised and agreed to give the plaintiff his personal guarantee of the account of” a company named; that the defendant did accordingly give his guarantee, but declines to pay the debt. The defendant denies all promise, giving of guarantee, etc., and sets up the Statute of Frauds.

The learned trial Judge finds the promise which purported to have been implemented by the delivery of a document which he considers satisfies the statute; and gives judgment for the plaintiff accordingly.

On the evidence—the defendant did not offer any—the facts appear to be plain. The defendant was the president of a building company, which became in arrear with its payments to the plaintiff for the installation of certain heating apparatus. The plaintiff was pressing for payment and the defendant gave him an order on mortgagees to pay him \$3,600. Some time thereafter, the defendant arranged with the plaintiff that he should not present this order, accepting instead the personal guarantee of the defendant; he then gave the plaintiff a document reading as follows:—

“City Builders Limited,

“April 11th, 1929.

“W. H. Miles,

“188 Dupont St.,

“Toronto.

“Dear Sir. (Re Rusholme Drive job.)

“Confirming our telephone conversation of yesterday, I beg to state that I shall personally see to it that you get your payments regularly as per contract.

“Trusting that this is entirely to your satisfaction,

“Yours very truly,

“City Builders Ltd.,

“per C. Zuckerman.”

The document was typed on the letter-head of the company, all but the words "C. Zuckerman" being typewritten; these words are in the defendant's handwriting.

There being a promise for valuable consideration to give a guarantee, that is, of course, a valid guarantee and not a worthless instrument—if this document is not such a guarantee, the agreement to give one is broken; and there is no objection on principle to consider the agreement to give a guarantee something distinct and different from a guarantee itself; and I would so hold and consider the agreement not within the statute—and this seems to be considered at least arguable in some jurisdictions. The law, however, of England, is authoritatively settled in the contrary sense, and a promise to give a guarantee is held to be within the statute: *Bushell v. Beavan* (1834), 1 Bing. N.C. 103; *Mallet v. Bateman* (1864), 16 C.B.N.S. 530; *S. C.* (1865), L.R. 1 C.P. 163; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778; *Davys v. Buswell*, [1913] 2 K.B. 47; and like cases. We are, consequently, bound by authority to hold that no action lies on the promise to give a guarantee, and the plaintiff must rely, as he does, upon the document as actually delivered. Were the case not within the statute, we might apply the principle of *Brogden v. Metropolitan Railway Co.* (1877), 2 App. Cas. 666; and, if within the statute but the statute not pleaded, that of *Olley v. Fisher* (1886), 34 Ch. D. 367. But, if the document is a guarantee, since the statute is pleaded, we must examine to see whether it satisfies the statute.

The statute is perfectly specific: R.S.O. 1927, ch. 131, sec. 4, provides: "No action shall be brought . . . to charge any person upon any special promise to answer for the debt . . . of any other person . . . unless the agreement . . . or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorised."

It is, I think, plain that the signature is not that of the defendant but is that of the company only: cf. *In re Barnard*, 32 Ch. D. 447 (which case, indeed, depended at least in part upon special considerations); *Smith v. Mason* (1911), Q.R. 40 S.C. 75; *Chapman v. Smethurst*, [1900] 1 K.B. 927 (C.A.), reversing *s.c.*, *ib.* 73, in which a note was signed "J. H. Smethurst's Laundry and Dye Works Limited. J. H. Smethurst, Managing Director"—

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 1931. and "Managing Director" being stamped by means of rubber  
 MILES stamps and the body of the note and the words "J. H. Smet-  
 v. hurst" being in Smethurst's handwriting: the note reading, "Six  
 ZUCKERMAN. months after demand, I promise to pay to Mrs. M. C. the sum  
 Riddell, J.A. of £300," etc. The Judge of first instance held that the word  
 "I" was very strong to shew that the promisor was a person in the  
 ordinary sense, an individual, and not the legal *persona* of a com-  
 pany, and that the "name of the company at the end of the note is  
 not to be treated as the signature of the maker . . . ." But  
 the Court of Appeal, Vaughan Williams and Kennedy, L.JJ., and  
 Joyce, J., did not agree. At p. 930, Kennedy, L.J., lays down the  
 true principle: "The question depends upon the intention of the  
 parties, which intention . . . must be gathered from the  
 terms of the document alone:" and Joyce, J., at p. 931, says that  
 "the use in the body of the note of the singular personal pronoun  
 'I' instead of . . . 'we' . . . which perhaps would  
 be better English . . . is not . . . sufficient to alter  
 the *primâ facie* effect of the affixing of the name of the company  
 as it was affixed."

When a document is signed, as this was, it answers the require-  
 ment for exoneration of the person who does the actual signing,  
 stated by Lord Ellenborough in the leading case of *Leadbitter v.*  
*Farrow* (1816), 5 M. & S. 345, at p. 349, viz., "he states upon the  
 face . . . that he subscribes for another:" *Boyd v. Mor-*  
*timer* (1899), 30 O.R. 290.

The principle that to find what the parties intended, we must  
 look at only the intention appearing on the face of the document,  
 has been stated in many cases: e.g., by Bramwell, B., in *Herald*  
*v. Connah* (1876), 34 L.T.R. 885, at p. 886. Cf. *Madden v.*  
*Cox*, 5 A.R. 473, at p. 495.

We cannot regard the signing of his name by the defendant,  
 purporting to verify the contract of the company, as being a  
 signing by him sufficient to make this his contract within the  
 Statute of Frauds. There are many cases in which there was not  
 a signing in the ordinary sense, in which the defendant has been  
 held liable from his name having been inserted in the contract,  
 such, for example, as the name being accompanied by the word  
 "witness," which is characterised by the Vice-Chancellor Chatter-  
 ton as an "otherwise unmeaning introduction of the word 'wit-

ness:’” *Wallace v. Roe*, [1903] 1 I.R. 32; but it must be taken as settled that the signature *alio intuitu* is not sufficient: Fry on Specific Performance, 5th ed., sec. 524. I do not further labour this point, as it is not seriously pressed.

During the course of the argument of the appeal, we offered the plaintiff to hold the matter and allow him to bring an action or take other proceedings to rectify the document sued upon, giving him two weeks for election and warning him that if he preferred to proceed with the appeal on its present footing, it would be disposed of as it stood. He declined, after due consideration, to ask any such relief—in the view I now take of the law, I think he was justified in his decision. I am unable to see how, the document being considered a guaranty, the Court can amend or correct it by changing the signature.

A distinction is to be drawn between the matters in which the statute speaks and authoritatively commands, and matters as to which it is silent. The statute is not concerned and it is wholly silent as to the contents of the document; it is wholly concerned with, and speaks only as to, the signature. Consequently, the Courts of Equity have for two hundred years held that they are not precluded by the statute from rectifying the contract in its terms—as has been said, the statute has no concern with the terms. As far back as *Thomas v. Davis* (1757), 1 Dick. 301, the Court has rectified the terms of a contract duly executed, though it was within the statute: cf. *Rogers v. Earl* (1757), *ib.* 295; *Pritchard v. Quinchant* (1752), Ambler 147. Accordingly, it has become textbook law that in cases of rectification of a document “it is not . . . an objection that the subject-matter of the contract is such that the Statute of Frauds requires written evidence thereof;” rectification will be ordered in a proper case, as was done in *Johnson v. Bragge*, [1901] 1 Ch. 28; *Cowen v. Truefitt Ltd.*, [1899] 2 Ch. 309; and other cases.

The most interesting, and for us the most important and authoritative, decision is that in the Judicial Committee of *United States v. Motor Trucks Ltd.*, [1924] A.C. 196. In that case, there was a formal contract properly signed (p. 197), but, by a common mistake, it did not express the true contract between the parties: Lord Birkenhead, delivering the opinion of the Judicial Committee, said, pp. 200, 201, that the power exercised by the Court to rectify mutual mistake does not “make any inroad upon”

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App. Div. the principle in such cases. "The statute, in fact, only provides  
 1931. that no agreement not in writing and not duly signed shall be  
 MILES sued upon; but when the written instrument is rectified there is a  
 v. writing which satisfies the statute, the jurisdiction of the Court  
 ZUCKERMAN. to rectify being wholly outside the prohibition of the statute." It  
 Riddell, J.A. may be said that there is nothing new in this decision except that  
 in Ontario the Court has the same power as was exercised in Eng-  
 land in *Olley v. Fisher*, 34 Ch. D. 367, *supra*.

With the most anxious desire to do justice according to the real merits of the case, and to hold this double-dealing defendant to his bargain, I have been unable to find any case which so much as suggests that we have the power either to rectify this contract and say that it is signed by the defendant, when it is clearly not so signed, or to compel him to sign it as he agreed—we have no more right to violate the Statute of Frauds than any other statute, and we are bound to administer the law as we find it, being a Court of Law and not of Morals.

I think, therefore, that the plaintiff was well advised in not taking proceedings that must in law be purely nugatory, and in which the Court could give him no relief. Nor should we now do anything more than decide the case as we have it; this will not interfere with the plaintiff proceeding to have the document rectified in any proceeding he may be advised.

The next point to be considered is whether we must look upon the transaction as one of guaranty, so as to be governed by the statute.

The law as to the application of the Statute of Frauds in such a case is laid down in *Jeffrey v. Alyea* (1916), 36 O.L.R. 391, at pp. 394, 395, thus:—

"From *Chater v. Beckett* (1797), 7 R.R. 201, to *Davys v. Buswell*, [1913] 2 K.B. 47, the rule had been followed that 'the question whether each particular case comes within . . . the statute or not depends . . . on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise:' *per* Vaughan Williams, L.J., [1913] 2 K. B. 47, at pp. 53, 54.

"The same principle has been adopted and consistently applied in the Courts of Ontario: see *Lee v. Mitchell* (1864), 23 U.C.R. 314; *Rounds v. May* (1874), 35 U.C.R. 367; *James v. Balfour*

(1882), 7 A.R. 461; *Beattie v. Dinnick* (1896), 27 O.R. 285; *Bailey v. Gillies* (1902), 4 O.L.R. 182; *Young v. Milne* (1910), 20 O.L.R. 366.”

See also 5 C.E.D. (Ont.) 441 and cases in note (j); *Huggard v. Representative Church Body*, [1916] 1 I.R. 1.

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I had thought that the facts as disclosed in evidence made it sufficiently clear that what was intended was not a guaranteeing of the account by the defendant, the president of the company, with the company remaining primarily liable, but a transference of the liability from the company to the defendant. Were this view tenable, the original debtor being no longer responsible, the statute would not apply.

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A careful and repeated perusal of the evidence, however, fails to confirm the view that I had expressed; and the facts seem to be that the company remains the debtor of the plaintiff and the defendant only a guarantor, unless we can interpret the facts as shewing that the transaction was one of indemnity, not of guaranty.

The argument that this was an indemnity is based upon such cases as *Sutton & Co. v. Grey*, [1894] 1 Q.B. 285, where, at p. 288, Lord Esher says, speaking of the test whether the transaction comes within the statute:—

“The test given is, whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and sec. 4 does not apply.”

Here it might be that the defendant was “to derive some benefit from” the arrangement, and consequently the statute does not apply.

Were we to follow American authority, we might well hold, as I was much inclined to hold, *ut res magis valeat quam pereat*, that here there was such an interest in the defendant as to make the transaction one of indemnity: e.g., in *Emerson v. Slater* (1859), 22 How. (U.S.) 28, at p. 43, the Supreme Court of the United States has it: “Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecu-

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niary or business purposes of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

Many American cases are cited to that effect. So, too, in *Davis v. Patrick* (1891), 141 U.S. 479, it is similarly held. In this case, Davis had advanced £5,000 to the Flagstaff Mining Company, and the company had sold and agreed to deliver to Davis, free of cost, 5,195 tons of ore, of which it had delivered only 200 tons, though Davis had paid for the full amount in full; the plaintiff made a contract with the company to transport certain ore but failed to obtain full payment; Davis, according to the plaintiff's story, "said . . . he would be personally responsible to me for the money, and for me to go on . . . he would see that I got every dollar of my money . . ." (p. 485). The Court held that he had "a personal, immediate and pecuniary interest in the transaction and is therefore himself a party to be benefited by the performance of the promise" (p. 488), as he was "so much to be benefited by the prompt and successful transportation of the ore" (p. 485): consequently "the performance of the contract" enuring "equally to the benefit of Davis and the company . . . his promise was not one purely collateral to sustain the obligations of the mining company, but substantially a direct and personal one to advance his own interests." Accordingly, he, "in any true sense of the term, occupied not the position of a collateral undertaker, but that of an original promisor;" and he was held liable, notwithstanding the Statute of Frauds.

Were this our law, I would have no hesitation in holding that the defendant had a "personal, immediate and pecuniary interest" in the contract of the plaintiff with his company being carried out. But such a view is authoritatively negated by such cases as *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778. That case is somewhat like the present; the defendant was a director and large shareholder in a company which he had financed; the plaintiffs were judgment creditors of the company; and he verbally promised the plaintiffs that he would endorse bills for the amount of the debt, on the strength of which the plaintiffs withdrew their *fi. fa.* It was argued on the authority of cases like *Sutton & Co. v. Grey*, [1894] 1 Q.B. 285, that the promise was not within the

Statute of Frauds; *cf. Couturier v. Hastie* (1852), 8 Ex. 40. The contention that it was an indemnity and so not governed by the statute was carefully considered and discussed by the Court, and it was held that the motive was immaterial (pp. 786, 787), and the object the important thing (pp. 787, 792); that the "interest" in the matter of the promisor to make the transaction indemnity rather than guaranty was not "a business interest . . . . that kind of interest which a creditor and a shareholder has in its prospects." To make it an indemnity, he must have had some legal interest in or charge upon the goods.

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So, too, in *Davys v. Buswell*, [1913] 2 K.B. 47, the fact that the guarantor was induced to guarantee a debt due by a company by reason of his having a floating charge on the assets and business of the company, and consequently it was "clearly to his interest that the business of the company should continue to be carried on, and that goods should continue to be delivered," so that he might realise his security, was held not to prevent the transaction being governed by the Statute of Frauds; it could not be said that he "gave the guarantee by reason of any liability or obligation which existed independently of the guarantee, or that he was contracting for the protection of any right" (pp. 55, 56). Substantially the same doctrine is laid down in our own Courts in *Young v. Milne*, 20 O.L.R. 366; *Erskine-Smith Co. v. Bordeleau* (1929), 63 O.L.R. 621, especially per Hodgins, J.A., at pp. 625, 626.

I can find no ground in law to support the judgment appealed from and would allow the appeal.

As to costs. The defendant had to come to this Court to obtain what I conceive to be his legal rights, and he should have his costs of appeal. In the Court below, while it is in general only the conduct in the case of the parties that is taken into consideration, in the present case I think that the defendant, a flagrant promise-breaker, should have no costs of resisting an attempt to make him keep his promise, even though in law he was not compellable.

In parting with this interesting and difficult case, I would express my obligations to the admirable article by Dean Falconbridge in 55 D.L.R. pp. 1 *sqq.*

While I am clear that no relief can be granted the plaintiff upon the pleadings as they stand, it may be that in an action with proper pleadings substantial justice can be done.

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It seems advisable to set out the facts in some detail. The plaintiff being entitled to receive a considerable sum of money from the company, there was delivered to him an order upon the mortgagees for \$3,600, on the 6th April, 1929, as had been agreed on, in response to a previous request by the plaintiff. Some time later, the order upon the mortgagees not having been acted upon, the defendant telephoned the office of the plaintiff, and had a conversation with the plaintiff's bookkeeper in the absence of the plaintiff himself. He asked her to convey a message to the plaintiff "to hold that order, not to present it," adding, "as I am going to give him a personal guarantee for the amount and I will see him later in the day . . . ." The message was faithfully delivered; the plaintiff and defendant had an interview, on the 10th April, at which it was agreed that a personal guarantee should be taken and the order not presented. On the 11th April, the "guarantee" set out above was sent to induce the plaintiff not to present the order. Then, quite some time after "that," there was another conversation between the parties in which the defendant insisted that the plaintiff had the promised guarantee, and need not worry.

It may well be that an action of damages for fraud will lie upon the facts, if they are fully developed; but the evidence now before us is not sufficiently clear and unambiguous to enable us to say that an action for fraud certainly should succeed; neither could we determine the amount of damages. It may be that the plaintiff can shew that he gave up the order or failed to present it by reason of believing the defendant's false statement that he had the defendant's guarantee. Of course, a false statement is none the less a fraud by reason of the fact that it is a statement as to the effect of a document: *Stewart v. Kennedy* (1890), 15 App. Cas. 108, and like cases.

I think, then, that we should say that the present adjudication is wholly without prejudice to any action the plaintiff may be advised to take for damages for fraud or otherwise.

MASTEN, J.A., agreed with RIDDELL, J.A.

FISHER, J.A.:—The action is for payment of \$3,580, being the amount claimed by the plaintiff as due to him under a personal guarantee given by the defendant on behalf of the City Builders Limited, of which he is the president.

The facts are: The plaintiff is a plumbing and heating contractor, and on the 21st December, 1928, entered into a contract with the City Builders Limited to install a heating and equipment plant for them in 12 houses for the sum of \$6,500.

The City Builders were in arrears in their payments to the plaintiff in April, 1929, and, as an inducement for the plaintiff to proceed with the work, the City Builders, who had placed a mortgage on their property, on the 6th April, 1929, gave the plaintiff an order for \$3,600 on the mortgagees for moneys still unadvanced, and on the same day the defendant requested the plaintiff not to put through the order for payment, as he, the defendant, would agree, in consideration of the plaintiff surrendering the order and proceeding with the contract, that he would personally indemnify or guarantee him the payments due and to become due under the City Builders' contract.

The negotiations leading up to the giving of the guarantee seem to have been conducted over the telephone.

At the trial it was argued by counsel for the defendant that if the letter of guarantee was held not to be a guarantee of the company but a personal guarantee, the defendant was, because of certain extensions of time given to City Builders by the plaintiff, discharged, but that argument was abandoned, and the real questions argued before this Court were whether or not there was a personal liability of the defendant or a company liability, and also that, there being no ambiguity appearing in the letter, oral evidence was inadmissible to vary it, and the 4th section of the Statute of Frauds pleaded by the defendant is a bar.

Our first inquiry is, was the learned trial Judge right in admitting oral testimony leading up to the giving of the guarantee in question, and that brings up for consideration the document itself and the circumstances under which it was given.

As pointed out, the company could not pay and the plaintiff refused to go on with the contract, and then followed the defendant's negotiations with the plaintiff. The defendant was personally interested and wanted the plaintiff to go on and as an inducement offered and had delivered to him the order for \$3,600 on the mortgagees which the plaintiff accepted.

On the same day that this offer was accepted the defendant made a second proposal that, in consideration of the plaintiff surrendering the order for \$3,600, he would personally guarantee

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App. Div. the payments to be made under the contract. The plaintiff ac-  
1931. cepted the terms of the second proposal, and the defendant had  
MILES the following letter typewritten and signed, and, upon delivery  
v. of it to the plaintiff, the plaintiff surrendered the security. The  
ZUCKERMAN. letter reads:—  
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“April 11th, 1929.

“Mr. W. H. Miles,  
“188 Dupont Street,  
“Toronto,  
“Ont.

“Dear Sir:— Re Rusholme Drive job.

“Confirming our telephone conversation of yesterday, I beg to state that I shall personally see to it that you get your payments regularly as per contract.

“Trusting that this is entirely to your satisfaction.

“Yours very truly,

“City Builders Limited,

“per C. Zuckerman.”

Upon the faith of this letter, the plaintiff completed the contract, after which the company went into bankruptcy, and, on the plaintiff's request for payment of the balance owing, the defendant refused to pay, his reply being that the letter was a company liability and not a personal liability. This action followed, and, apart from the plaintiff's evidence, the only other witness was the plaintiff's bookkeeper, McKinney, who swore that the defendant made the following admissions:—

“Please tell Mr. Miles to please hold that order, not to present it, as I am going to give him a personal guarantee for the amount and that he will hear from me later in the day and I want to get in touch with him.”

And Mr. Zuckerman said to the plaintiff:—

“Well! what need you worry? You have my letter with my personal promise in it. You will get every cent of your money—why worry about it?”

The defendant did not go into the witness-box and called no witness, so that the plaintiff's evidence remains uncontradicted. That the letter is contradictory and ambiguous there can be no doubt, because, if the defendant was not to be personally bound, what possible meaning is there to be attached to the words, “*I shall personally see to it that you get your payments regularly as*

per contract." The words "I shall personally" cannot and never were intended to mean the company, and the signature of the company is a plain contradiction of the body of the letter, rendering it at once ambiguous.

A question to be asked here is—the company being already bound to pay—what possible object was there in the defendant giving this letter to the plaintiff if he was not to be personally bound to pay if the company did not? As pointed out by the trial Judge, if the defendant was not to be personally liable the letter is meaningless.

I think a fair inference is that the defendant signed the letter as he did by mistake and delivered it to the plaintiff in the honest belief that he was liable to pay if the company did not, and that it was not until after the plaintiff made demand upon him that he discovered or was advised that, as the company had signed, his present defence was available. In my opinion the signature of the defendant is his personal signature, and the printing of the company's name is mere surplusage.

The learned trial Judge was, in my opinion, right in admitting oral testimony. See *Young v. Schuler* (1883), 11 Q.B.D. 651, 653; *Canadian Welsh Anthracite Coal Ltd. v. Pember*, 32 O.W.N. 75.

I have always understood that the Statute of Frauds was passed to prevent fraud and not for the purpose of assisting any one in the commission of it. See *Heard v. Pilley* (1869), L.R. 4 Ch. 548, and *Roche-fouchauld v. Boustead*, [1897] 1 Ch. 196.

In this case the fraud is so barefaced and the defendant's conduct in now asking the Court to assist him in the commission of it so brazen, that I do not hesitate to say that to do so would shock the conscience of the Court, and cast reflection on the administration of justice. If the defendant did not intend to bind himself personally, the gross fraud was in deliberately securing from the plaintiff a surrender of the \$3,600 order and in persuading the plaintiff to complete the contract upon the faith of the defendant's letter in which he personally agreed to pay if the company did not, and, after the plaintiff had completed the contract and the company had gone into bankruptcy, the only answer to the plaintiff's demand for payment is the defendant's plea of the 4th section of the Statute of Frauds. I think it would be difficult to persuade any one that the defendant did not know that the company was

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I would dismiss the appeal with costs.

*The Court being equally divided, appeal dismissed  
 with costs*

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[APPELLATE DIVISION.]

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VANVOLKINBURG V. GOMMER.

May 1. *Malicious Prosecution—Reasonable and Probable Cause—Malice—Prosecutrix Relying on Facts as she Understood them—Absence of Close Inquiry into Facts.*

The plaintiff, driving a motor-car while drunk, had an accident whereby two persons named D. driving with him and the child of the plaintiff were hurt. An information was laid against him by one McK., that he, while in charge of an automobile, did, by wilful conduct, cause grievous bodily harm to the three persons. He pleaded guilty and was sentenced to imprisonment for one month. The defendant read of his trial and sentence in a newspaper, and thought that he was tried and sentenced for the injury to D. Looking to the plaintiff for compensation for the expense caused to her by the injury to her child, and failing to obtain satisfaction, she laid an information against the plaintiff for criminal negligence causing bodily harm. This was dismissed by the magistrate upon the plea of *autrefois convict*; and the plaintiff sued her in a County Court for malicious prosecution. The County Court Judge found that there was reasonable and probable cause for the prosecution, and dismissed the action:—

*Held*, upon appeal—assuming, without deciding, that the offence was the same as that for which the plaintiff had been previously convicted, and that the magistrate was right in dismissing the complaint—that there was evidence of malice, the defendant, influenced by an indirect motive, seeking to obtain repayment of the money she had expended; but the most express malice is immaterial if there be reasonable and probable cause.

The prosecutor is bound to exercise reasonable care in ascertaining the facts, and *bonâ fide* belief in the existence of sufficient facts is not enough; while, on the other hand, he is not chargeable with fault simply if by extra caution and research he might have obtained more light on the subject.

Here the defendant relied upon the facts as she understood them; and that she was entitled to do. While, by extra caution and research, she might have discovered the facts vitiating her prosecution, there was no reason for determining that she acted without reasonable and probable cause because she did not pursue that course; and the appeal should be dismissed.

*Per MASTEN, J.A.*:—The finding of the trial Judge in such a case as this does not differ from any other finding of fact; and there was

no adequate ground for saying that the trial Judge was wrong in the view which he took. 1931.

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AN appeal by the plaintiff from the judgment of the County Court of the County of Frontenac (McLEAN, Co. C.J.) dismissing an action for malicious prosecution.

April 14. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*W. M. Nickle*, for the appellant, argued that there was no reasonable and probable cause for the prosecution. There was malice. The defendant before instituting the prosecution did not lay all the facts before her solicitor. She did not exercise that reasonable care in ascertaining the facts, before laying her charge, which she was obliged to do.

*C. M. Smith*, for the defendant, respondent, contended that she had reasonable and probable cause for the prosecution. She had exercised reasonable care in finding out the facts. She did not know that the former conviction had been for injury to her child. She was not bound to exercise extra caution and research. Reference to *Connors v. Reid* (1911), 25 O.L.R. 44; *Love v. Denny and Vincent* (1929), 64 O.L.R. 290; 7 C.E.D. (Ont.) 100-103; *Lucy v. Smith* (1852), 8 U.C.R. 518; *Malcolm v. Perth Mutual Fire Insurance Co.* (1898), 29 O.R. 717; *Owens v. Martindale* (1928), 63 O.L.R. 87.

May 1. RIDDELL, J.A.:—The plaintiff, driving a motor-car while he was drunk, not unnaturally had an accident whereby two persons named Davey driving with him and the child of the defendant were hurt.

An information was laid against him, that he "on the 31st day of August, A.D. 1929, at the said city of Kingston, did unlawfully, while in charge of automobile No. 289852, by wilful conduct, cause grievous bodily harm to Irwin Davey, Benjamin Davey, and Edward Gommer," the information being laid by one McKee, not by the defendant. He pleaded guilty and was sentenced to gaol for one month. The defendant read of his trial and sentence in the newspaper, and thought that he was tried and sentenced for the injury to Davey.

Looking to the plaintiff for compensation for the expense she had been put to by reason of the injury to her child, and failing

App. Div. to obtain satisfaction, she laid an information against the plaintiff  
1931. in the following form:—

VANVOLKIN- "that he on the 31st day of August, A.D. 1929, at the city of  
BURG Kingston aforesaid . . . having under his control a motor-car,  
v. was criminally negligent in the operation of the same, thereby  
GOMMER. causing bodily harm, contrary to the terms of the Criminal Code."  
Riddell, J.A.

For the purposes of this appeal, I shall consider, without deciding, that this was the same offence as that upon a charge of which the plaintiff had been previously convicted, and that the magistrate was right in dismissing the complaint when at the hearing he held that the defence of "*Autrefois convict*" was available to the accused.

After the acquittal on this ground, the plaintiff commenced this action of malicious prosecution, at the trial of which the learned County Court Judge held that there was reasonable and probable cause and dismissed the action. The plaintiff now appeals.

Of course, there is ample evidence of what the law calls malice in such cases, the defendant being influenced by an indirect motive of obtaining repayment of the money she had to expend: Halsbury's Laws of England, vol. 19, p. 680; 7 C.E.D. (Ont.) 90, 91, and cases cited; and, were presence of malice to be held sufficient, the adjudication would be wrong. But it is beyond question that the most express and actual malice is immaterial if there is reasonable and probable cause; 7 C.E.D. (Ont.) 94, and cases cited, e.g., *Richards v. Joynt* (1910), 1 O.W.N. 1065, 16 O.W.R. 671.

Nor is there any question as to the law in respect of reasonable and probable cause. The prosecutor is bound to exercise reasonable care in ascertaining the facts, and *bonâ fide* belief in the existence of sufficient facts is not enough; while, on the other hand, he is not chargeable with fault simply if by extra caution and research he might have obtained more light on the subject.

Here the plaintiff claims that, when the defendant was consulting her solicitor and being advised that an action lay, she should have told him that the plaintiff had already received a prison sentence for misconduct upon the occasion in question; and, if she relied upon the advice of her solicitor alone for her justification, there might be something in the contention. But she relies upon the facts as she understood them; and that, I think, she is entitled to do. Nor was there any reason why she should tell the

magistrate this when she was laying the information—he knew it in any case.

That, but for the fact that the plaintiff had been already punished for an offence upon the occasion of which the defendant complained, there was ample reasonable and probable cause, is not and cannot be disputed; and the sole question here is whether what would otherwise be reasonable and probable cause ceases to be such by reason of a fact of which the defendant was not aware and which she believed to be wholly different—in other words, was she bound to make inquiry into the actual charge upon which the plaintiff was committed to prison, before laying her charge against him? While, by extra caution and research, she might have discovered the fact vitiating her prosecution, I can find no reason for holding that she acted without reasonable and probable cause because she did not pursue this course.

I think the learned Judge was right in dismissing the action on the ground stated, and would dismiss the appeal with costs.

MASTEN, J.A.:—This is an action of malicious prosecution, at the trial of which the learned County Court Judge held that there was reasonable and probable cause, and dismissed the action. The plaintiff appeals.

Upon a perusal of the evidence and of the reasons for judgment of the learned trial Judge, I have reached the conclusion that this appeal must be dismissed.

Had I been the trial Judge, I am by no means certain that I should have reached the same conclusion as Judge McLean; certainly I would have approached the consideration of the evidence of the defendant with profound suspicion. The finding, however, of the trial Judge in such a case does not differ from any other finding of fact. It must depend very largely on the opinion formed by the Judge on the evidence as adduced before him, having regard, in such a case as this, not only to the demeanour, but also to the mental capacity, of the witness. That being so, I find no adequate ground on which I am able to say that the trial Judge was wrong in the view he took.

LATCHFORD, C.J., and ORDE and FISHER, J.J.A., agreed with RIDDELL, J.A.

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*Appeal dismissed.*

## [APPELLATE DIVISION.]

1931.

## NATIONAL TRUST CO. LTD. V. BARKER.

May 1.

*Assessment and Taxes—Purchaser of Land at Tax-sale—"Use" of Land during Period Allowed for Redemption—Assessment Act, R.S.O. 1927, ch. 238, sec. 167—Land Leased by Purchaser—Redemption by Mortgagee—Attempt to Recover Rents Collected.*

The defendant purchased at a tax-sale land of which the plaintiff company was mortgagee, and let the land to a tenant. The plaintiff company redeemed the land, and then sued the defendant for the rental he had received in the interval:—

*Held*, that the defendant had the right to lease the land as an owner could and to receive the rents; under sec. 167 of the Assessment Act he had a right to "use the land without deteriorating its value;" and that use was not restricted to the mere right to occupy the land. And the mortgagee, not being in possession, could not claim an accounting merely because it had paid the arrears of taxes.

AN appeal by the defendant from the judgment of the Second Division Court of the County of Brant (HARDY, Co. C.J.), in favour of the plaintiff company for the recovery of \$144 collected by the defendant for rent of a building on land which the defendant had purchased at a tax-sale, the plaintiff company, as mortgagee, having redeemed.

April 14. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*Gordon Waldron*, K.C., for the appellant, argued that under sec. 167 of the Assessment Act, R.S.O. 1927, ch. 238, the defendant, as purchaser at the tax sale, became entitled to use the land and so to enter upon it and take the rents and profits during the period in question. He had the right to protect the buildings from deterioration which might result if they were left unoccupied, and so he did right to rent them. The statute gave no right to the plaintiff company to compel the defendant to account for the rents and profits. The word "use" in sec. 167 is not confined to the mere right of personal occupancy by the purchaser.

*J. H. Smith*, for the plaintiff company, respondent, contended that "use" meant personal occupancy by the purchaser and that the purchaser could merely protect from waste or spoliation. The plaintiff company was entitled to the rents: Manning on Assessment and Rating, p. 481; *Churcher v. Bates* (1878), 42 U.C.R. 466.

May 1. LATCHFORD, C.J.:—This appeal is from the judgment of Hardy, County Court Judge, in the Second Division Court of

the County of Brant, dated the 12th February, 1931, awarding the plaintiff \$144 and costs.

At the close of the argument for the respondent, the Court was unanimously of opinion that the appeal should be allowed; but, as the point in question was new, it was considered that reasons for our opinion should be briefly stated.

The facts are simple and not in dispute. The defendant had purchased at a tax-sale, conducted by the Corporation of the City of Brantford, lands of which the plaintiff company was mortgagee. A dwelling of some kind was erected on the premises. Barker was given by the treasurer of the municipality a certificate under sec. 166 of the Assessment Act, R.S.O. 1927, ch. 238.

By virtue of sec. 167(1) of the Act, the defendant then became "the owner of the land, so far as to have all necessary rights of action and powers for protecting the same from spoliation or waste, until the expiration of the term during which the lands may be redeemed; but he shall not knowingly permit any person to cut timber growing upon the land or otherwise injure the land, nor shall he do so himself, but he may use the land without deteriorating its value."

"Land," by sec. 1(h) 4 of the Act, includes buildings.

The term during which redemption may ordinarily be exercised is within one year from the date of sale—sec. 173. An additional period, not here of importance, is fixed in certain circumstances by sec. 174(2).

Subsection (2) of sec. 167 absolves the purchaser from liability for damage done to the property without his knowledge while the certificate is in force.

Under sec. 167, Barker became, pending redemption, the *owner* of the lands and the buildings upon it and entitled to use them, subject to no restriction whatever, so long as the use did not deteriorate their value and he committed or knowingly permitted no waste. As owner he had the right to protect the buildings from spoliation such as would result if the premises were left unoccupied. He exercised that right by placing a tenant in charge, and there is no evidence that there was any waste.

It was admitted that the defendant could have personally occupied the building and used it before redemption. To prevent the deterioration to which vacant property is subject, the leasing of the building to a tenant tended to its preservation in the condition

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App. Div. in which it was when Barker became the owner of the land on which  
1931. it was situated.

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In addition, no right exists apart from statute and none is accorded in any statute to a mortgagee to recover rent collected in the circumstances of this case; nor, I venture to think, could the prior owner recover such rentals any more than he could recover damages for the occupation of the premises, if used by the defendant himself.

The appeal is allowed with costs and the action dismissed with costs, including the same counsel fee, \$25, that was fixed in the judgment below as payable by the defendant.

RIDDELL, J.A.:—The facts of this case are not in dispute; they are set out in sufficient detail in the reasons for the judgment appealed from, and may be thus stated:—

The plaintiff was the mortgagee of certain property, the taxes upon which falling in arrear, the land was sold under the provisions of the Assessment Act, R.S.O. 1927, ch. 238; the defendant bought at the sale and, paying the purchase-price, entered into possession, and let the land to a tenant. The plaintiff exercised its statutory right and “redeemed” the land, then sued the defendant for the amount of the rental he had collected in the interval; the learned County Court Judge, in the Second Division Court of the County of Brant, gave judgment in favour of the plaintiff, and the defendant appeals.

The whole proceedings are purely statutory, and we must look to the statute to discover the respective rights of the parties; we have no concern with what might be considered just or reasonable, but must apply the statute as we find it.

Section 167 of the Act provides that “the purchaser shall, on the receipt of the treasurer’s certificate of sale, become the owner of the land” for certain purposes, not here material, and that “he may use the land without deteriorating its value.” There is no unusual meaning to be attached to the permission to “use” the land. What is meant is that he may use the land in any way the owner may so long as he does not interfere with the value of it. I am of opinion that he had the right to lease the land as the owner could, to make money out of it as the owner could, to receive the rents, which he did.

There is nowhere given by the statute any right in the person redeeming to call him to account, if he has not deteriorated the value of the land; the rights of the person redeeming are specifically mentioned in the statute, and nowhere is there given or suggested the right to obtain from the purchaser any profit he has made during the time he had the right to use the land. In the absence of such statutory provision, no such right exists. Nothing in the Common Law applies to give such a right—nor in Equity. The case of *Churcher v. Bates*, 42 U.C.R. 466, is not in point; it decides nothing in question in this case. Nor is the authority of Cooley, *Law of Taxation*, 4th ed., vol. 3, p. 2898, para. 1461, helpful to the plaintiff. The author says:—

“The tax-purchaser has no right to the rents and profits of the property during the period allowed for redemption, unless it is otherwise provided by statute; and if he has been in possession he must account therefor on redemption by the owner. A tax-purchaser, on the cancellation of his title, is chargeable with net profits received from the lands.”

In Ontario, the statute does provide in effect that the purchaser has the right to the rents and profits, by giving him the use of the land. The author is not dealing with the law of the Province of Ontario.

There being no statutory right given on redemption to have an account of the rents and profits, I am unable to see that the plaintiff can hold the judgment, and would allow the appeal and dismiss the action with costs here and below.

MASTEN, J.A.:—Having had an opportunity of perusing the judgments which have been prepared by my brother Riddell and by my brother Orde, I concur in the conclusion that the appeal must be allowed and in the reasons stated by them, to which I cannot usefully add.

ORDE, J.A.:—I agree with the judgment of my brother Riddell that the appeal must be allowed.

I can see no reason for restricting the “use” of the land which sec. 167 of the Assessment Act, R.S.O. 1927, ch. 238, vests in the purchaser at a tax-sale to the mere right to occupy the land. The right to any accounting for any rents or profits derived from such use must rest upon the statute. For the time being, the purchaser is the sole owner, and is accountable, upon redemption by the de-

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App. Div. faulting taxpayer, to the extent provided by the Act and not otherwise.  
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Orde, J.A.

Quite apart from this, I fail to see upon what ground a mortgagee, who was never in possession and who at the time it redeemed had taken no steps to obtain possession, can claim an accounting merely because it has paid the arrears of taxes. The redemption of the lands by the mortgagee by the payment of the taxes gave the mortgagee no higher or better title than it had before. Like the payment of any other taxes in arrear, it was for the protection of the mortgagee's security, and the amount paid would merely be added to the mortgage-debt. Until the mortgagee had placed itself in the position of a mortgagee in possession, any accounting which the tax-purchaser might be called upon to make—assuming some such liability to anybody—would be to the owner of the equity, and not to the mortgagee.

The appeal should be allowed and the action dismissed with costs here and below.

FISHER, J.A., agreed with LATCHFORD, C.J.

*Appeal allowed.*

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[WRIGHT, J.]

1931.

May 4.

RE MIDDLETON AND TOWNSHIP OF GODERICH.

*Municipal Corporations—Rating By-law of Township—Provision that Rating for School Purposes be as Requested by Trustees—Non-compliance with secs. 57(1) and 88(p) of Public Schools Act—Invalid Delegation of Power to Trustees—Assessment Act, sec. 3—Municipal Act, sec. 307(2)—Illegality of Severable Provisions of By-law—Order Quashing—Illegality Apparent on Face of By-law—Absence of Discretion to Refuse to Quash—Costs of Motion to Quash.*

A rating by-law passed by a township council provided (sec. 4) "that the rate for public school purposes be as requested by public school trustees:"—

*Held*, that sec. 4 of the by-law did not comply with secs. 57(1) and 88(p) of the Public Schools Act, R.S.O. 1927, ch. 323, and was invalid.

*Held*, also, that it was invalid because it attempted to delegate the power which by the Municipal Act is vested solely in the township council to the public school trustees of the several school sections; and the illegality appeared on the face of the by-law.

*Russell v. City of Toronto* (1907), 15 O.L.R. 484, followed.

Where the illegality of a by-law appears upon its face there is no discretion in the Court to refrain from quashing it.

*Re Howard and City of Toronto* (1928), 61 O.L.R. 563, followed.

*Re Butterworth and City of Ottawa* (1918), 44 O.L.R. 84, explained.  
*Cartwright v. Town of Napanee* (1905), 11 O.L.R. 65, was reversed in  
*Re Cartwright and Town of Napanee* (1906), 8 O.W.R. 65.

Section 4 of the by-law, which is severable from the other sections, should, therefore, be quashed.

This result may cause inconvenience and confusion as to the taxes already levied and collected; and, as the plaintiff could have resisted the payment of his taxes on the ground of the invalidity of the by-law, without taking proceedings to quash, and taking that course would not have resulted in inconvenience and confusion to the municipality, the discretion of the Court was exercised by refusing costs to the applicant.

MOTION to quash by-law No. 5 of 1930 of the Township of Goderich, and particularly sec. 4 thereof.

The motion was heard by WRIGHT, J., in the Weekly Court, Toronto.

*Waldon Lawr*, for the applicant.

*J. C. Makins*, K.C., for the respondent township corporation.

May 4. WRIGHT, J.:—Before discussing the grounds for attack upon this by-law, I think it well to give a short summary of the material facts.

On the 5th August, 1930, the Council of the Township of Goderich passed a rating by-law containing several clauses, of which the one relevant to the present dispute is as follows:—

“4. That the rate for public school purposes be as requested by public school trustees.”

From the material filed it appears that on the date of the passing of this by-law no requisition such as contemplated by para. (p) of sec. 88 of the Public Schools Act, R.S.O. 1927, ch. 323, had been submitted to the municipal council by the trustees of school section No. 10 of the Township of Goderich. From the affidavit of Robert G. Thompson, the clerk of the township of Goderich, it would appear that some time in September the secretary of the school board called the clerk of the township up by telephone and asked him to extend the time for making the annual requisition, when he was informed by the clerk of the township that, under the circumstances, if the requisition were with the council by the middle of September it would be sufficient.

Pursuant to this arrangement, a requisition dated the 10th September, 1930, was submitted to the clerk of the township, and after receipt of the requisition the clerk proceeded to strike a rate for the school section in question and prepared the collector's roll

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Wright, J. in accordance with the rate so struck by him. No further by-law  
1931. was passed relative to the tax rate by the municipal council.

Re It was stated upon the argument that practically all the taxes  
MIDDLETON for the school section in question had been paid except those of the  
AND applicant, who, on the 22nd December, wrote a letter to the Reeve  
TOWNSHIP and Council of the Township of Goderich protesting against the  
OF action of the school trustees and the township council, and declin-  
GODERICH. ing to pay his school taxes for the year 1930.

In these circumstances the motion is made to quash the by-law. Several grounds are urged, but the only substantial ones appear to be as follows:—

(1) That sec. 4 of the said by-law is indefinite, irregular, and illegal because it does not define the respective amounts payable to the various public school sections in the said township or the trustees thereof and does not fix a rate either by mills or otherwise to be inserted in the collector's roll, etc.

(2) That the board of public school trustees for school section 10 did not submit to the municipal council on or about the 1st August, 1930, or at any other time before the passing of the said by-law, an estimate for the current year of the expense of the school under their charge, as required by sec. 88(*p*) of the Public Schools Act.

(3) That the estimate submitted in September or October was not a proper estimate, in that it did not furnish details shewing how the amount required was made up.

I think it is quite clear, in fact it was not seriously disputed, that the by-law in question does not comply with the provisions of the law respecting the same.

The pertinent provisions are sec. 88(*p*) of the Public Schools Act, which has already been referred to, and sec. 57, subsec. (1), of the same Act, which requires the council to levy and collect upon the taxable property of the public school supporters in any section such sums as may be required by the board for school purposes.

Section 3 of the Assessment Act expressly provides for the levying of the rate, and enacts that the rate shall be calculated at so much in the dollar upon the assessment, etc., and sec. 307, subsec. (2), of the Municipal Act provides for the passing of one or more by-laws for assessing and levying the rates.

Measured by the requirements of these enactments, it is quite apparent that the by-law in question fails to comply with the same. Section 4 of the by-law, which has already been extracted, does not profess to name a rate in the dollar, nor does it profess to name a stated amount, but merely states that the rate shall be as requested by the public school trustees. These trustees did not at any time request any rate to be levied but made a request for a specific amount, and, while this may be a technical objection, yet in a taxing by-law a strict construction must be applied.

In my view, therefore, the by-law is invalid because it does not comply with the provisions of the Acts relating thereto as already cited.

Another serious objection is that the by-law purports to delegate the striking of the rate to another body than the municipal council. In other words, it is an attempt to delegate the power which by the Municipal Act is vested solely in the municipal council to the public school trustees of the several sections. This cannot be done. See *Attorney-General and Town of Truro v. Chambers Electric Light and Power Co. Ltd.* (1913), 14 D.L.R. 883, and *Russell v. City of Toronto* (1907), 15 O.L.R. 484, particularly the judgment of Mr. Justice Garrow at p. 505.

The by-law is invalid on this ground, and the illegality appears upon its face.

There are, however, attending circumstances which are urged as sufficient to justify the Court, in the exercise of its discretion, to refuse to quash the by-law.

No action was taken and no protest launched by the applicant until after the taxes or a substantial portion thereof had been collected, and there was, therefore, some laches on his part. The effect of quashing the by-law will be to inconvenience the municipality in its financial operations and to create confusion. As well, the applicant could resist the payment of his taxes in any proceeding taken to recover the same from him, without quashing the by-law.

A careful consideration of the authorities, however, leads me to the conclusion that where the illegality of a by-law appears upon its face there is no discretion in the Court to refrain from quashing it. There is a long line of decisions in support of this proposition. See *Re Fenton and County of Simcoe* (1885), 10 O.R. 27, where Chief Justice Wilson reviews the various authorities

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Wright, J. up to the date of the judgment. At p. 40 the learned Chief Justice adopts and approves of the judgment of Mr. Justice Burns in *Grierson v. County of Ontario* (1852), 9 U.C.R. 623. Another case which supports this view is *In re Huson and Township of South Norwich* (1892), 19 A.R. 343, 350, where Chief Justice Hagarty states that a marked distinction has always been made by the courts between objections apparent on the face of the by-law and those that are shewn *aliunde*.

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This distinction was also recognised in *Re Markham and Aurora* (1902), 3 O.L.R. 609, and the recent case of *Re Howard and City of Toronto* (1928), 61 O.L.R. 563. At p. 574 of the case last cited Mr. Justice Masten states:—

“Unless the illegality complained of appears on the face of the by-law or the statutory prerequisites to the exercise of the council’s jurisdiction have not been fulfilled, the Court has a discretion to refuse to quash.”

Opposed to that view are some dicta in *Re Butterworth and City of Ottawa* (1918), 44 O.L.R. 84, where Mr. Justice Hodgins, in delivering the judgment of the Court, says that the jurisdiction to quash a by-law is discretionary; but that is, in my view, explained by the remarks which follow, to the effect that, when the subject legislated upon is clearly within the municipal authority and the objection is to the mode in which the particular power has been exercised and that difficulty can be remedied by further or different action, the by-law should not be quashed unless it is clear that the method adopted cannot be supported in any view of the matter. It will be noted that in the case last cited the objection to the by-law was shewn *dehors* the by-law itself, and so the actual decision is not in conflict with the principle enunciated in the other cases.

In all the cases to which I have been referred by counsel, or which I have been able to discover in my research, the discretion of the Court was exercised only when the objections were shewn by material other than the by-law itself.

There are in many of the cases sweeping statements to the effect that the power to quash a by-law is discretionary; but, when the actual decisions are examined, it will appear that in no case where the illegality appeared on the face of the by-law itself has the Court refused to quash the same.

The case of *Cartwright v. Town of Napanee* (1905), 11 O.L.R. 69, would appear at first blush to be an authority for the proposition that if the by-law is not incurably bad the Court has a discretion to refuse to quash. The decision in that case was reversed by the Court of Appeal and the report of the decision of that Court (1906) will be found, *sub nom. Re Cartwright and Town of Napanee*, in 8 O.W.R. 65. The appellate court held that the judgment in the court below was wrong, and that there was no estoppel on the part of the appellants, who were the applicants in the motion to quash, so that the decision in the court below cannot now be regarded as a binding authority.

In the result I have come to the conclusion that the fourth section of the by-law under review must be quashed. This conclusion is arrived at with considerable reluctance, as the result may cause inconvenience on the part of the township authorities and confusion as to the taxes already levied and collected. Had I been of the opinion that it was a case in which I could exercise my discretion, I would have unhesitatingly done so and dismissed the motion; but, holding the view that where the by-law is bad on its face there is no discretion in the Court to refuse to quash the same, I have no alternative but to quash the fourth section of the by-law.

As already pointed out, the applicant could have resisted the payment of his taxes on the ground of the invalidity of the by-law, without taking proceedings to quash, and a proceeding of that nature would not have resulted in the consequent inconvenience and confusion to the municipality that his present motion will cause. Under the circumstances I propose to exercise my discretion and refuse costs to the applicant.

Throughout this judgment I have referred to the by-law as a whole, but I am confining my judgment to sec. 4 thereof, which is clearly severable from the remaining sections, and can, therefore, be dealt with separately.

The order will go quashing sec. 4 of the by-law without costs.

Wright, J.

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AND  
TOWNSHIP  
OF  
GODERICH.

## [APPELLATE DIVISION.]

1930.  
 Dec. 15.  
 1931.  
 May 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION LTD. v. REAUME.

*Company—Bankruptcy—Sums Withdrawn by Directors—Wages—Action by Trustee to Recover—Locus Standi of Trustee—Companies Act, R.S.O. 1927, ch. 218, sec. 94.*

The plaintiff, the trustee in bankruptcy of the property of an incorporated electric company, sued the defendants, who were the directors and officers of the company and also the only shareholders except their wives, to recover sums of money withdrawn by the defendants from the funds of the company, no by-law authorising the withdrawal having been passed by the directors—the trustee relying upon sec. 94 of the Companies Act, R.S.O. 1927, ch. 218—and the trial Judge, finding that the defendants had earned by their work not as officers or directors, but as employees of the company, a large part of the sums withdrawn, fixed the value of the services rendered and gave judgment for the plaintiff for the difference between that value and the sums actually received by the defendants respectively:—

*Held*, upon appeal, that the plaintiff company, as trustee in bankruptcy, had no *locus standi* to maintain the action; its right was no greater than the right of the company which it represented, no special right being conferred upon it by statute; the bankrupt company could not recover payments actually made by it for wages, nor could its trustee; and the appeal was allowed and the action dismissed.

ACTION by the trustee in bankruptcy of the property of Reaume Electric Ltd. against Herbert D. Reaume, Norman P. Reaume, and Frank H. Reaume, to recover from them sums aggregating a large amount withdrawn by them from the funds of the company.

The action was tried by GARROW, J., without a jury, at Sandwich.

*W. J. Beaton*, K.C., for the plaintiff.

*W. D. Roach*, for the defendants.

December 15, 1930. GARROW, J.:—The plaintiff is the trustee in bankruptcy of the property of Reaume Electric Limited, which on the 16th October, 1929, made an authorised assignment to the plaintiff company, which was followed by the appointment of the latter as trustee at the meeting of creditors of the company.

The defendants are Herbert D. Reaume, Norman P. Reaume, and Frank H. Reaume, respectively secretary-treasurer, vice-president, and president of the debtor company, and the action is brought to recover from them sums aggregating a large amount withdrawn by them from the funds of the company during

the years 1926, 1927, 1928, and down to the month of October, 1929—the precise amounts claimed from each being: Herbert D., \$14,517.12; Norman P., \$13,830.88; and Frank H., \$9,039.51.

The only shareholders of the company were the three defendants and their wives, and, in addition to being officers of the company, the defendants were also directors.

The statement of claim alleges merely that the three defendants were directors; that the sums mentioned were withdrawn by them; and that no by-law authorising these payments or any payments was ever enacted by the directors; and therefore the sums paid are claimed by the trustee, relying upon sec. 94 of the Companies Act, R.S.O. 1927, ch. 218.

It was established that no by-law authorising the payments was ever passed, but it was also shewn that each of the three defendants rendered daily services to the company, not as directors or officers, but similar to those which would be expected of employees.

Counsel for the plaintiff contended that, to some extent at least, it should be assumed that the payments made were taken *quâ* directors and to that extent should be disallowed, conceding, however, that to the extent to which the services rendered were those of an ordinary employee and were reasonable under all the circumstances, they should stand.

I am unable to find that any payments were made or taken as directors of the company, and it is clear that each of the defendants rendered services to the company for which wages or salaries would have been payable had they been rendered by others.

Counsel for both parties concede that in this view it becomes only a question of what the services rendered are worth, and it was substantially on this basis that the case was argued.

Reference was made to the cases of *Canada Bonded Attorney and Legal Directory Ltd. v. Leonard Parmiter Ltd.* (1918), 42 O.L.R. 141, and *Marks v. Rocsand Co. Ltd.* (1921), 49 O.L.R. 137. It is clear, I think, on these authorities and others, that, while a director is not entitled to receive payment for services rendered *quâ* director, unless a by-law authorising such payment is enacted, there is nothing to prevent a director, who renders services unconnected with his position as director, from receiving reasonable compensation for those services.

There is nothing in the records of the company to indicate any fixed rate of payment to any of the defendants. Apparently each

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1930.  
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Garrow, J. withdrew moneys as he required it—in many cases cheques being  
1930. issued to various tradesmen and charged to the one of the three for  
CANADIAN whose living or other expenses they were incurred. It is suggested  
CREDIT that there was a kind of informal understanding among the three  
MEN'S that their drawings would be limited to \$75 a week, but there is  
TRUST no record of any such agreement, certainly nothing which would  
ASSOCIATION be binding upon the company.  
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Before the company was organised in April, 1925, the father, Frank H. Reaume, had been carrying on a business of electrical contractor, and his two sons, the other two defendants, were in his employ. After the incorporation of the company, each of them continued to perform for the company much the same kind of services as they had formerly rendered for their father. Norman Reaume is a qualified journeyman electrician and the holder of a union card. He was employed, he says, as foreman, and it was his job to make estimates in respect of proposed contracts, look after the performance of contracts by the men, take charge of all outside work, and, at the same time, work with the men at wiring, etc. The regular hours per week for this kind of work were 44 hours a week, but he worked, he says, always much longer each week than this. He is at present employed as an electrical journeyman and earns \$1.55 an hour, and, with overtime, earns sometimes as much as \$128 a week, sometimes as little as \$80. The average wage received by him from the debtor company ran from \$64 in 1926 to \$98 in 1929. It is stated that for overtime a workman is entitled to double the usual wage, and that as a foreman he is entitled to 10 per cent., in addition, over the regular rate of payment.

The defendant Herbert D. Reaume acted chiefly as a clerk in the retail store and repair-shop conducted by the company, buying supplies and selling goods over the counter. He also looked after the credits and the banking, employed help, and made up the weekly pay-roll of the workmen employed. He says he worked on an average ten hours a day, and on Saturdays was always on hand until eleven o'clock at night. He received, throughout the operations of the company, an average weekly wage of from \$63 in 1926 up to \$84 in 1929.

The defendant Frank H. Reaume, the father, looked after collections and did some figuring on new contracts, but I think it is fair to say that he was not nearly so active as either of his sons.

He received an average weekly sum of from \$42 in 1926 to \$56 in 1929. Garrow, J.

1930.

All three defendants swear that the moneys received by them was no more than the company would have been obliged to pay for similar services rendered by strangers to the company of the same degree of skill and experience.

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One Simpson, credit manager of the Northern Electric Company, for 17 years paid a monthly visit to the office of the company. He appears to be familiar with the kind of work the defendants were engaged in. In his opinion the services rendered were worth, as to the father \$100 a month, as to the son Norman \$250 a month, and as to Herbert \$200 a month.

Another witness, called by the plaintiff, gave it as his opinion that the services rendered by Herbert were worth no more than \$35 a week; that a collector, such as the father, was worth about \$25 a week, and a foreman from \$50 to \$60 a week.

For the defendants, in addition to their own evidence, another witness was called to shew that the wages of a journeyman electrician ran from \$1.12 an hour in 1925 to \$1.37 in 1929; that a foreman was entitled to receive 10 per cent. additional, and that all overtime is paid for at double the usual rate.

The company has in the course of four years lost practically its entire capital of upwards of \$25,000, and owes a large sum to its creditors. Granting that the services rendered by the defendants should be compensated for, I can see no reason for allowing them the highest wages obtainable for the class of work performed by them, nor why they should, for instance, be paid for their overtime at all. Either through bad financing on the part of Herbert, bad figuring on the part of Norman, or bad collecting on the part of Frank, or a combination of all three, the company has been wrecked, and I can see no reason for the assumption that services which have brought about this result should be regarded as extremely valuable.

I have come to the conclusion, on the whole evidence, that a fair and reasonable allowance to make would be as follows:—

Herbert, 49½ months at \$200 a month=\$ 9,900.00

Norman, 49½ months at \$250 a month= 11,375.00

Frank, 49½ months at \$150 a month= 7,425.00

For the difference between these amounts and the sums actually

Garrow, J. received by the defendants respectively there will be judgment,  
 1930. with the costs of the action.

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The defendants appealed from the judgment of GARROW, J.

May 6, 1931. The appeal was heard by MULOCK, C.J.O.,  
 HODGINS, MIDDLETON, and GRANT, J.J.A.

*Roach*, for the appellants.

*Beaton*, K.C., for the plaintiff association, trustee, respondent.

THE COURT, at the conclusion of the argument, allowed the appeal and dismissed the action, upon the ground that the plaintiff company, as trustee in bankruptcy, had no *locus standi* to maintain the action. Its right was no greater than the right of the company which it represented, unless some special right was conferred upon it by statute. The bankrupt company could not recover payments actually made by it for wages, nor could the plaintiff company.

*Appeal allowed.*

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[IN BANKRUPTCY.]

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RE CANADIAN HORSESHOE CO. LTD.

May 12.

*Bankruptcy—Application by Trustees for Discharge—Objections by Claimants—Bankruptcy Act, secs. 69, 125—Assessment Act, sec. 112(11)—No Conflict between Dominion and Provincial Legislation—Notice of Claim of City Corporation for Taxes and Water-rates—Non-compliance with Statute—Assets of Bankrupt Estate—Realisation.*

The application of the authorised trustees in bankruptcy of the company's property for their discharge was opposed on behalf of the Corporation of the City of H., where its operations had been carried on, upon the ground that the trustees should pay the arrears of land taxes for 1926, 1927, and 1928, and also arrears of water-rates for those years:—

*Held*, that the provisions of sec. 112, subsec. (11), of the Assessment Act, R.S.O. 1927, ch. 238, are, by virtue of sec. 125 of the Bankruptcy Act, R.S.C. 1927, ch. 11, made part of the Bankruptcy Act, as effectively as if they were actually incorporated therein.

*Re Electrical Fittings and Foundry Co. Ltd.* (1926), 58 O.L.R. 364, 7 C.B.R. 265, is overruled by *City of Brantford v. Imperial Bank of Canada* (1930), 65 O.L.R. 625.

No notice was given directly to the trustees by the city corporation in respect of the taxes; the notice on which the claim was founded was the collector's declaration, made on the 12th January, 1927, proving the city's claim, which was lodged with the custodians. The trustees, the same individuals, were not appointed until the 19th Janu-

ary, 1927. The declaration stated that the debtor company was indebted to the city in the sum of \$1,171.59, as shewn in the account annexed, which was made up of tax-bills, including a bill for business tax for 1927, "estimated" at \$239.40. The balance was for land and business taxes for 1926. At that time no by-law had been passed by the council fixing a rate for 1927 or levying any tax for that year. The declaration stated that the sum claimed was payable in preference to any other charges or claims pursuant to the Assessment and Bankruptcy Acts:—

*Held*, that this proof of claim could not be treated as a notice within subsec. (11): the collector did not give "notice of the amount due for taxes;" and the city did not become entitled to the benefit of preferential payment.

Nor could a notice given by the solicitor for the city of intention to object to the trustees being discharged, on account of their failure to pay taxes, be regarded as a notice under subsec. (11).

There should be an order for the discharge of the trustees after the expiration of one month, unless an application should be made under sec. 69 of the Bankruptcy Act in respect of any assets which should be realised on by the trustees.

APPLICATION by the authorised trustees in bankruptcy of the property of the above-named company for their discharge.

The application was heard by SEDGEWICK, J., sitting in Bankruptcy.

*R. C. H. Cassels*, K.C., for the trustees.

*J. A. McEvoy*, K.C., for the Burke Electric Company and the Griffin Manufacturing Company, ordinary creditors, and for the National Trust Company Ltd., trustee for bondholders.

*J. W. Pickup*, for the Corporation of the City of Hamilton.

May 12. SEDGEWICK, J.:—The discharge of the trustees of this estate is opposed, first, by the Corporation of the City of Hamilton, which contends that the trustees should pay sums claimed for taxes and water-rates; second, by the National Trust Company Ltd., trustees under a mortgage to secure bonds, who claim that the trustees should have paid the taxes and should have arranged for recompense to the estate in respect of occupation by the trustees acting in fact for the benefit of the Canadian Bank of Commerce, while manufacturing goods held by the bank under sec. 88 of the Bank Act, and also should have applied rents received on account of taxes and other charges against the property; and, third, by the ordinary creditors above-named, on the ground that the trustees have or should have movable assets of a substantial value which should be realised for the benefit of the estate.

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So far as the ordinary creditors' objection goes, I am satisfied that the discharge of the trustees cannot be held up forever on such grounds. If there are any assets which can be realised, the order which I propose to make will give these creditors leave to protect their interests, if they think they have any interests to be protected. Section 69 of the Bankruptcy Act affords the means, if any creditors desire to avail themselves of them.

So far as the objections of the National Trust Company Ltd. are concerned, the objection in respect of non-payment of taxes must stand or fall with the objection raised by the City of Hamilton. The other objection is that something should be allowed for the trustees' occupation of the estate lands while carrying on the business. I have not been referred to any authority on the matter, and I do not propose to deal with the point, because of the fact that, so far as I can see, the allowance of any reasonable amount would not, in view of the fact that there is no prospect of there being any dividend for ordinary creditors, give any relief to the National Trust Company Ltd., a secured creditor.

It does not appear on any evidence before me that the trust company has proved for any amount as an ordinary creditor. Even if it has so proved, no reasonable allowance would produce anything for its benefit.

I have, therefore, to consider only one objection, that of the Corporation of the City of Hamilton.

The City of Hamilton claims that the trustees should pay \$2,143.24, the amount of the arrears of land taxes for 1926, and the land taxes for 1927 and 1928, and also the sum of \$939.05 for arrears of water-rates for 1926, and water-rates for 1927 and 1928.

I am satisfied that, in view of the provisions of the Bankruptcy Act, sec. 125, giving effect to provincial legislation respecting liens and preferences for taxes, there is really no conflict between Dominion and Provincial legislation, that is, between sec. 112, subsec. (11), of the Assessment Act and the provisions of the Bank Act relating to security taken by a bank pursuant to that Act. The provisions of sec. 112, subsec. (11), of the Assessment Act are, by virtue of sec. 125 of the Bankruptcy Act, made part of the Bankruptcy Act, as effectively as if they were actually incorporated into the Bankruptcy Act.

I think that I must regard the decision of the Appellate Division in *City of Brantford v. Imperial Bank of Canada* (1930), 65 O.L.R. 625, as overruling *Re Electrical Fittings and Foundry Co. Ltd.* (1926), 58 O.L.R. 364, 7 C.B.R. 265.

The city bases its right on sec. 112, subsec. (11), of the Assessment Act, R.S.O. 1927, ch. 238. That subsection is as follows:—

“Where personal property liable to seizure for taxes as hereinbefore provided is under seizure or attachment or has been seized by the sheriff or by a bailiff of any court or is claimed by or in possession of any assignee for the benefit of creditors or liquidator or of any trustee or authorised trustee in bankruptcy or where such property has been converted into cash and is undistributed, it shall be sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator or trustee or authorised trustee in bankruptcy, notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator or trustee or authorised trustee in bankruptcy shall pay the amount of the same to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever.”

The authorised assignment made by the debtor is dated the 4th day of January, 1927. On the 12th day of January, 1927, the collector of taxes for the city made the declaration proving the city's claim, and, as I understand, this declaration was lodged with the custodians of the debtor's property. The trustees were appointed on the 19th January, 1927. The custodians and the trustees are the same individuals, and I assume that the trustees were in possession of the debtor's property from and after the 19th January, 1927.

The collector's declaration is made on the ordinary form. It states that the debtor was at the date of the authorised assignment and still is justly and truly indebted to the city in the sum of \$1,171.59, as shewn by the account annexed. This annexed account consists of tax-bills, including a bill for the debtor's business tax for the year 1927, “estimated” at \$239.40. The balance of the amount was for land and business taxes for 1926. At that time, no by-law had been passed by the council of the city fixing any rate for the year 1927 or levying any tax for that year.

The declaration next states that the city had acquired no security whatsoever. (I am inclined to think this is inaccurate, as the city had and still has a statutory first charge or lien on the

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lands for the land taxes, and probably this security should have been valued, but that is probably of no importance with respect to the matters under consideration here). The next paragraph in the declaration is as follows:—

“4. And the said amount will be payable to the Corporation of the City of Hamilton in preference and priority to any other, and all other fees, charges, liens, or claims whatsoever, pursuant to the Assessment and Bankruptcy Acts.”

It is agreed that no notice was given directly to the trustees by the city in respect of the taxes, unless the notice given by the city in December, 1928, of intention to oppose the trustees' discharge can be called such a notice. (I shall consider that notice later). The notice on which the city founds its claim is the notice in the proof of claim already mentioned, which was given to the custodians.

Returning now to subsec. (11) of sec. 112 of the Assessment Act, it is to be observed, first, that the subsection occurs in the section which provides for distress in case of non-payment of taxes.

This section provides in subsecs. (1) and (2) that “subject to the provisions of sec. 111, in case taxes . . . remain unpaid for fourteen days after demand or notice made or given pursuant to” the provisions of certain prior sections, “the collector . . . may . . . levy the same with costs by distress” upon the goods and chattels referred to in the said subsections.

These provisions do, I think, define the “personal property liable to seizure for taxes as hereinbefore provided” in subsec. (11). That is, the personal property liable to seizure is personal property available for distress at the expiration of fourteen days after the demand or notice referred to in subsecs. (1) and (2). Therefore the taxes for the year 1927, included in the city's proof of claim, could not be payable under the provisions of subsec. (11) on a demand made under that subsection on the 12th January of that year. It follows, even if the proof of claim could be regarded as a sufficient notice, that there can be no priority in respect of the \$239.40 for business taxes for 1927 included in the proof of claim. It appears however that these particular business taxes were paid by the trustees. (See Mr. Richardson's cross-examination, question 244.)

The next question is, can the proof of claim stand as a notice within the provisions of subsec. (11)? I think it cannot. In the

first place, the proof of claim is on its face proof of a state of facts or law then existing. The collector declares to the amount owing and also in effect declares the existence at that moment of a preferential right. That preferential right did not then exist, as no notice had been given under subsec. (11). Further, it is to be observed that the notice required is a substitute for distress. The section deals with distress. Subsection (11) supplies a substitute for distress. "It shall be sufficient," says the subsection, in the proper circumstances, "for the tax collector to give to the . . . authorised trustee in bankruptcy, notice of the amount due for taxes, and in such case the . . . authorised trustee in bankruptcy shall pay the amount of the same to the collector in preference and priority," etc.

Now it seems to me that the notice under subsec. (11) of the amount due for taxes should be a serious and formal notice, purporting to be what the Act intends it should be, namely, a proceeding in substitution for an actual distress, and not a document filed under an Act passed by another legislative authority, intended to set forth the claim which the person filing the document actually has by law at the moment it is made. Again, it seems to me quite clear that the subsection had no effect at the time the declaration was made. The personal property of the debtor was not on the 12th January, 1927, in possession of an authorised trustee in bankruptcy. On that date the collector could not give the notice which is a sufficient substitute for distress because there was no person to whom it might be given.

Further, it should be noted that subsec. (11) requires that the notice be given by the tax collector, and what the subsection allows as "sufficient" in substitution for distress shall be "notice of the amount due for taxes." I take this to mean the amount for which the collector could distrain. The collector's declaration proving this claim included, as I have already mentioned, the estimated amount for business taxes to be levied in 1927. This amount was certainly not then "due" so as to entitle the collector to distrain. Therefore, if the Act is to be read strictly, and even if the proof of claim could be allowed as a notice, the collector did not give "notice of the amount due for taxes."

It follows that, in respect of the taxes mentioned in the proof of claim, the collector did not give any sufficient notice under subsec. (11) of sec. 112 of the Assessment Act, and therefore the

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Sedgewick, J. city did not become entitled to the benefit of the preferential payment of these taxes.

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It also follows that, if the trustees had disallowed the city's claim as proved by the collector's declaration and the city had appealed, the trustees' disallowance must have been given effect to; notice within subsec. (11) being a necessary precedent to the filing of such a proof of claim.

In December, 1928, the trustees gave notice of intention to apply for their discharge as trustees. Counsel for the city gave notice of their intention to object to such discharge on account of the failure of the trustees to pay taxes. That notice is given by the city solicitor, and is supported by an affidavit of the tax collector shewing taxes on the debtor's land for 1926, 1927, and 1928, amounting, with interest and penalties, to \$2,143.24, and water-rates consisting of balance for 1926, 1927, and 1928, amounting, with interest and penalties, to \$929.05, still unpaid. Counsel for the city seems to claim that this notice is a sufficient notice under the Assessment Act. This notice does not purport to be such a notice as sec. 112(11) of the Assessment Act requires, and a reading of it would not lead any one to suppose that it was so intended. I do not think I can allow it as such. Even if I were disposed to do so, I think the city has no fund on which it can claim as proceeds in the hands of the trustees, except proceeds of automobiles and a hammer, sold by the trustees, amounting to \$356.80. (See trustees' statement attached to affidavit of Sinclair G. Robertson, dated the 3rd January, 1929.)

My reasoning is as follows: The city could have distrained for taxes at any time after the 19th January, 1927, when the trustees went into possession. But, the person taxed not being in possession, goods and chattels on the land not belonging to the person taxed or to the owner are not subject to seizure. (See the first proviso in sec. 112(4) of the Assessment Act). The bank was the owner of the goods covered by its security, and these goods were not then "personal property liable to seizure for taxes" within the meaning of subsec. (11). Consequently the proceeds of these goods were not available for the benefit of the city when the notice was given in December, 1928: *City of Brantford v. Imperial Bank of Canada*, 65 O.L.R. 625. There were apparently other goods which might have been levied upon, "machine parts, tools, etc." (see schedule C. of Richardson's affidavit, dated the 5th

April, 1930), but there were not realised by the trustees. Some were apparently used up in carrying on the business. The balance went into the possession of the National Trust Company Ltd., trustee under a trust deed securing debentures. At any rate, when the December notice was given, the trustees were not in possession of these goods or of the proceeds thereof. It may be that they are still available under distress.

Again, I am asked by the city to direct the trustees to pay the land taxes covering the period during which the trustees were in possession, and similarly with respect to water-rates. The trustees have paid the business taxes which were in arrear when they went into possession and the business taxes while they were in possession; also the water-rates for water which they used while carrying on the business. I have not been furnished with any authority by which they should be required to pay more.

The application before me is that of the trustees for discharge. The order will go for discharge, after the expiration of one month from this date, unless in the meantime the Burke Electric Company or the Griffin Manufacturing Company makes an application under sec. 69 of the Bankruptcy Act in respect of any assets which should be realised on by the trustees.

It is possible that, if the trustees had within a reasonable time dealt with the city's claim, the city might have obtained some benefit by a proper notice under subsec. (11) of sec. 112 of the Assessment Act. Because of this I do not think I should order costs against the City of Hamilton.

There will be no order as to costs.

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[APPELLATE DIVISION.]

BUNTING V. SERVOS.

1931.

May 15.

*Partition—Tenants in Common of Remainder in Land—Right of one to Compel the other to Suffer Partition—Refusal of Life-tenant to Consent—Partition Act, secs. 1, 2, 3.*

The plaintiff and defendant were entitled, after their mother's life-estate in certain land, to the remainder as tenants in common.

The mother refused to consent to a partition:—

*Held* (RIDDELL and ORDE, JJ.A., dissenting), that the plaintiff was not entitled as against the defendant, who opposed his application, to an order for partition of the lands.

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Only those entitled to possession of their shares in land are entitled to partition.

*Morrison v. Morrison* (1917), 39 O.L.R. 163, followed.

*Per RIDDELL and ORDE, JJ.A.*:—The plaintiff and defendant, being tenants in common of an estate in land, the plaintiff is a person interested in land, and has the right to compel the defendant to suffer partition: Partition Act, R.S.O. 1927, ch. 142, secs. 1, 2, 3.

AN appeal by the plaintiff from an order of ROSE, C.J., in Chambers, dismissing a motion for an order for partition of land.

March 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

A. W. *Marquis*, K.C., for the appellant, argued that he was entitled to partition under the provisions of sec. 2 of the Partition Act, R.S.O. 1927, ch. 142, because the property is vested in the plaintiff and defendant as tenants in common, the plaintiff has been occupying one-half of the land as his portion with the consent of his sister, and was allowed by his mother, the life-tenant, to occupy that portion subject to the payment of rent. The fact of there being a life-estate to which the tenancies in common are subject does not deprive the appellant of his right to partition. The life-estate still remains.

A. *Courtney Kingstone*, K.C., for the defendant, respondent, contended that tenants in common in remainder could not invoke the Partition Act: *Murcar v. Bolton* (1884), 5 O.R. 164. One is not entitled to partition unless he have an estate in possession: Halsbury's Laws of England, vol. 21, p. 840. The appellant here holds only as lessee of the life-tenant. Reference also to *Rajotte v. Wilson* (1904), 3 O.W.R. 737, and *Fisken v. Ife* (1897), 28 O.R. 595.

May 15. LATCHFORD, C.J.:—This appeal is by leave from an order of ROSE, C.J., in Chambers, dismissing a motion on behalf of the plaintiff for an order for the partition of a parcel of 50 acres in the township of Grantham.

The parties, who are brother and sister, are tenants in common of the land, subject to a life-interest in their mother, who declined to consent to the desired partition, but was not made a party to the proceedings. Mrs. Servos opposed the application.

The reasons for the dismissal are stated to be that the learned Chief Justice was of opinion that partition could not be ordered because of the existing life-tenancy in the mother, and because the

trustees, mentioned in a certain deed under which the plaintiff claimed title, had not the power which they assumed to exercise in conveying the land to the parties to these proceedings as tenants in common subject to their mother's life-estate.

The material in support of the motion consisted of two affidavits made by Mr. Marquis and one made by the plaintiff. The earlier of the affidavits of Mr. Marquis identifies certain conveyances: the first, a deed of trust between Sarah E. M. Bunting and William H. Bunting and others, dated the 5th March, 1901; and the other, a deed or copy of a deed dated the 20th February, 1923, from William H. Bunting and Alice Margaret Hume to the plaintiff and the defendant.

The only additional matter here of relevancy contained in the second affidavit of Mr. Marquis is an averment that the plaintiff "has made lasting improvements on the property, and is occupying a verbal partition of the property as between himself and his sister, amounting to 28 acres of the 50 acres, the whole farm."

Bunting's affidavit sets forth that he acquired title to the lands jointly with Mrs. Servos by deed dated the 19th February, 1923 (the actual date of the deed is the 20th February), and duly registered; and that the deed is a conveyance in fee simple to himself and his sister, subject to a life-estate in his mother Katherine Bunting, now Katherine Beare.

The deed of 1901 is a conveyance from Sarah E. M. Bunting to William H. Bunting and Alice M. Hume, "upon trust, to permit one Charles Bunting and his wife Catharine Bunting the free use and enjoyment of the said lands and the rents issues and profits therefrom for and during the term of their natural lives or during the term of the natural life of the survivor of them and upon the death of the said Charles Bunting and Catharine Bunting his wife to pay to the proper guardian duly appointed of the infant children if any of the said Charles Bunting the annual rents issues and profits of the said lands for their support and maintenance and upon the youngest child of the said Charles Bunting arriving at the full age of twenty-one years to grant and convey the said lands in fee simple to all the children of the said Charles Bunting equally as tenants in common and in the event of the death of any child or children of the said Charles Bunting before such deed shall have been executed and delivered leaving issue them surviving such issue shall be entitled to the share their parent would have

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been entitled to if living and the trustees shall have the power and authority to convey such interest in the said lands to the legal personal representatives of such deceased child and upon the total failure of issue of the said Charles Bunting then to reconvey the said lands unto the party of the first part or her heirs . . . ."

The deed of 1923, executed by William H. Bunting and Alice M. Hume, as surviving trustees under the deed of 1901, recites that Charles Bunting and Sarah Emma Mary Ross, the former Sarah E. M. Bunting, are dead; that Charles Lawrence Bunting and Alice Augusta Servos are the only lawful children of Charles Bunting and his wife Catharine (the spelling varies), and have requested the grantors to convey the said lands to them subject to the life-estate of their mother. Then, in execution of the trusts contained in the deed of 1901, the conveyance purports to grant the 50 acres to the plaintiff and his sister in fee simple, "subject to the life-estate of the said Catharine Beare, which is reserved from this conveyance." The deed contains the following clause: "And the said grantees hereby release and forever discharge the said trustees of and from the provisions covenants and conditions set forth in the said trust deed." The plaintiff signed the deed, and, although it was intended that Mrs. Servos should also sign, she did not sign it, and she deposes that she did not consent to it.

Whether the later deed was executed or not in pursuance of the power contained in the deed of 1901, I am firmly of opinion that the application of the plaintiff for partition was properly dismissed.

Nothing in the material filed in support of the motion made before the learned Chief Justice indicates how the applicant came to be in occupation of part of the 50 acres. However, in the notice of appeal to this Court it is stated that he had paid his mother a certain "rental in lieu of her life-estate," and had been "permitted by her to occupy and enjoy this portion as his own, subject to the payment of the said rent."

What the rent alleged to have been paid amounted to or what was the term of the lease was not disclosed. It was candidly admitted by Mr. Marquis that what Bunting wanted was to have the 28 acres which he held under lease from his mother set apart from the remainder of the property as his portion of the whole.

In *Murcar v. Bolton* (1884), 5 O.R. 164, when the statutory provisions for partition and sale did not materially differ from

those contained in the present Act, R.S.O. 1927, ch. 142, it was held by a majority of the Queen's Bench Division, Hagarty, C.J., and Cameron, J. (Armour, J., diss.), that tenants in common in remainder could not invoke the Partition Act, R.S.O. 1877, ch. 101, as amended by 42 Vict. ch. 22, sec. 5, as against a tenant for life.

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To the same effect is *Rajotte v. Wilson*, 5 O.W.R. 737, a decision of Falconbridge, J. In *Morrison v. Morrison* (1917), 39 O.L.R. 163, the Appellate Division, Meredith, C.J.C.P., Riddell, Lennox, and Rose, JJ., set aside the order of Clute, J. (1916), 38 O.L.R. 362, made upon the application of a dowress whose dower had not been assigned. It was there held that only those entitled to possession of their shares in land are entitled to partition. The law is elaborately discussed by the learned Chief Justice. However, I think it is unnecessary to do more than refer to his final statement, that the law of this Province, in respect to the right of a person not in possession to compel partition, is in accord with that of England.

Here the possession of the plaintiff in the 28 acres is merely as lessee of the life-tenant, and is not a possession giving him an interest in the land such as in the contemplation of the statute entitles him to partition.

I would dismiss the appeal with costs.

RIDDELL, J.A.:—By an indenture of record, on the 5th March, 1901, Miss Bunting conveyed certain lands to trustees, "upon trust, to permit one Charles Bunting and his wife Catharine Bunting the free use and enjoyment of the said lands and the rents issues and profits therefrom for and during the term of their natural lives or during the term of the natural life of the survivor of them and upon the death of the said Charles Bunting and Catharine Bunting his wife to pay to the proper guardian duly appointed of the infant children if any of the said Charles Bunting the annual rents issues and profits of the said lands for their support and maintenance and upon the youngest child of the said Charles Bunting arriving at the full age of twenty-one years to grant and convey the said lands in fee simple to all the children of the said Charles Bunting equally as tenants in common and in the event of the death of any child or children of the said Charles Bunting before such deed shall have been executed and delivered leaving

App. Div. issue them surviving such issue shall be entitled to the share their  
1931. parent would have been entitled to if living and the trustees shall  
BUNTING have the power and authority to convey such interest in the said  
v. lands to the legal personal representatives of such deceased child  
SERVOS. and upon the total failure of issue of the said Charles Bunting  
Riddell, J.A. then to reconvey the said lands unto the party of the first part or  
her heirs with full power to my trustees to sell the said lands at  
any time in their discretion and with the proceeds to hold the same  
and invest the same for the purposes and upon the trust above  
mentioned and the purchaser from my said trustee shall not be  
bound to see to the application of the purchase-money."

There were only two children of Charles Bunting, the present appellant (the plaintiff) and the defendant; the said Charles Bunting died on the 5th August, 1905, and his wife survives and lives on the property. The two surviving trustees, by indenture of record, dated the 20th February, 1923, conveyed to the plaintiff and defendant the said property in fee simple, "subject to the life-estate of the said C.B., which is reserved from this conveyance." The defendant swears that she was not a consenting party to this conveyance, and that she is informed and believes that the property is still vested in the trustees.

The plaintiff moved before his Honour Judge Campbell, November, 1929, for partition of the lands; that learned Judge referred the application to a Judge sitting in Court; Chief Justice Rose heard the application, opposed as it was by the defendant; and on the 9th October, 1930, dismissed it with costs. The plaintiff now appeals. The life-tenant objects to the partition, as does the defendant. We are informed that the grounds upon which the learned Chief Justice refused the application were that "because there was a life-tenancy, partition could not be ordered, and also because the trustees mentioned did not have power to convey the property."

Counsel for the respondent relies, *inter alia*, upon the law as stated in Halsbury's Laws of England, vol. 21, p. 840, that one is not entitled to partition unless he has an estate in possession; but a reference to the case cited shews that the author is speaking of the old Bill in Chancery for Partition: *Evans v. Bagshaw* (1869-70), L.R. 8 Eq. 469, L.R. 5 Ch. 340. Nor, as I think, do the Ontario cases—even if well decided, as to which I express no opinion—stand in the way or make it plain that, if there is a life-

tenancy, partition will not be granted if the life-tenant objects. In *Murcar v. Bolton*, 5 O.R. 164, there are certain dicta which look in that direction, but the real question was whether a life-tenant could be forced to submit to partition, her life-tenancy being part of the estate to be partitioned, she to be turned out of her property and receive some money instead (p. 182); in *Rajotte v. Wilson*, 3 O.W.R. 737, S.C., 40 C.L.J. 702, the life-tenant was a party defendant, and, of course, it was sought to partition her estate. So, in *Fisken v. Ife*, 28 O.R. 595, the life-tenant seeking partition was not granted it; and Boyd, C. (p. 597), explained *Murcar v. Bolton* as a "direct holding . . . that a sale could not be ordered as against the will of the life-tenant of the whole property."

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The will works out in this way: (1) the widow has a life-tenancy of the whole that cannot be interfered with by any one, trustees or otherwise; (2) upon the youngest child coming to age, it is the duty of the surviving trustees to make a grant and conveyance of the lands to these children as tenants in common, if both are then alive, and if either or both be dead at the time the younger would have come of full age, if alive, then to the survivor, if there were one, along with the "issue" of the other; and, if both were then dead, to the "issue" of both.

In the event which has happened, the only two children of Charles Bunting were both alive when the younger came of age; thereupon it became the duty of the executors to "grant and convey the said lands in fee simple" to these two; of course, this conveyance could not interfere with the life-tenancy of the widow.

The trustees followed the directions of the will strictly, as they were in law necessitated to do; and made the conveyance of the 20th February, 1923. To do this they required no consent of either of the children; it is open to the defendant to refuse to take any benefit under this conveyance, but this does not affect the validity of the conveyance itself—she takes under the conveyance or not at all.

The result then is that there are a life-tenant and two tenants in common of the reversion.

It is not proposed to interfere with the life-tenant in any way, either physically or on paper—she is to be left to enjoy her right-ful estate in precisely the same way as if no proceedings had been taken in partition. What is proposed to be partitioned has no

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reference to her estate or possession, but only to the paper-title of the estate in remainder after her death.

The simple question here is, "Can tenants in common of an estate in remainder be compelled to suffer partition?"

The question is answered by the precise words of the Partition Act, R.S.O. 1927, ch. 142, sec. 2: "All . . . tenants in common . . . of any land in Ontario may be compelled to . . . suffer partition . . . ." Section 3(1) gives the right to take proceedings in partition to "any person interested in land in Ontario." And "land" is defined in sec. 1 so as to include "all estate and interests therein." It will not be disputed that these two children of Charles Bunting are tenants in common of an estate in land; and I think it clear that the statute covers the case.

If the parties act with any semblance of reason, there need be no difficulty in working out the order. No one desires a sale, there is no intention of interfering with the life-tenant—all the applicant desires to have is certainty as to the land he will have when the life-tenancy ceases.

I think the appeal should be allowed with costs and the order go for partition according to the Act.

MASTEN, J.A.:—I concur in the conclusion reached by my lord the Chief Justice that this appeal should be dismissed.

For one reason we are bound by the judgment of the Appellate Division in *Morrison v. Morrison*, 39 O.L.R. 163, where, reading the judgment of the Court (Meredith, C.J., Riddell, Lennox, and Rose, J.J.), Meredith, C.J., says (pp. 171, 172):—

"My opinion is, and always has been, that the law of this Province, in this respect (partition), is in accord with that of England; that all alike, no matter how they take, stand upon a like footing; that *none but those entitled to possession*, that is, none but those who really need it, are entitled to partition."

This is not a casual observation of the Chief Justice, but the considered conclusion of the Court on which the allowance of the appeal was based.

Now, in the second place, while it may be that, on a proper reading of the statute, "lands" include estates in remainder, and possibly that the appellant is given a status to make such an application as the present, yet the difficulty in his way is that he is not entitled to "partition" because, in my opinion, "partition," as used in the

statute, means actual present physical division, among those entitled, of the very property itself, and does not mean a declaration regarding future rights in specific property of which the parties may at some future date become entitled to possession.

In the third place, I do not agree with the argument advanced that the order sought can do no harm and may be of great practical advantage to the applicant.

I know nothing about the nature of the property in question, but it is easy to see how an adjudication before the determination of the life-estate might result in grave injustice.

For example, if the property in question were a large acreage of vacant land in the suburbs of a rapidly growing city, who can forecast how at the expiry of a life-estate in say 20 or 30 years the relative values of the different parts of the tract would stand? Undoubtedly some would be, relatively to the remainder, more valuable than the partition indicated, and some would be relatively less valuable. So, if a gold-mine or an oil-flow were discovered on one portion and not on another. The tenant in common of the remainder, if opposed to the partition, ought not to be obliged to forgo his right to an even division at the expiry of the life-estate.

ORDE, J.A.:—I have read and carefully considered the judgments of my lord the Chief Justice and my brother Riddell.

The only parties who are concerned in or can be affected by our judgment are the two parties now before the Court. They are tenants in common in remainder of the lands in question. Neither the life-tenant, nor the issue of the tenants in common (if the latter have any rights, as to which I prefer to say nothing), can be prejudiced by a judgment for the partition of the estate of the tenants in common.

For this reason I do not think the case of *Murcar v. Bolton*, 5 O.R. 164, and the other cases cited, have any bearing upon the question raised.

“Land” is defined by the Partition Act, R.S.O. 1927, ch. 142, sec. 1, as including not only lands, tenements, and hereditaments, but, to make it clear that the term means land in its widest legal significance, as including “all estate and interests therein.”

I can see no escape from the conclusion that when two or more persons have an estate in lands, either as tenants in common or as joint tenants, any of them is entitled as against his co-tenants to

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partition or sale under the Act, even when their ownership is subject to some prior estate such as a life-tenancy. If this is not the case, part of the Act is meaningless.

We are not concerned with any difficulties which may arise in giving effect to a judgment for partition. The rights of the life-tenant cannot, of course, be disturbed. The physical division of the parcel by a fence without her consent would doubtless constitute a trespass. How the demarcation of the boundary is to be made will be for the parties. Possibly the provisions of the Surveys Act, R.S.O. 1927, ch. 202, may enable them to accomplish this. And, as we have no right here, in the absence of the issue of the two parties, to interpret the terms of the trust deed to their prejudice, their rights cannot be affected.

I am of the opinion that the appeal should be allowed and judgment for partition granted. The appellant should get his costs of this appeal and of the appeal to the learned Chief Justice of the High Court.

FISHER, J.A.:—In my opinion we are bound by *Morrison v. Morrison*, 39 O.L.R. 163, in which it was decided that only those entitled to possession are entitled to a partition, and I agree with the reasoning and conclusion of my lord the Chief Justice and of my brother Masten, that this appeal fails and should be dismissed with costs.

*Appeal dismissed (RIDDELL and ORDE, JJ.A., dissenting.)*

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[APPELLATE DIVISION.]

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SALE AND SALE V. McMILLAN.

May 15.

*Solicitors—Action against Executor of Deceased Person for Amount of Bill of Costs—Absence of Retainer.*

It is the duty of a solicitor to obtain a written authority from his client before he commences a suit. The plaintiffs, solicitors, not having established a retainer in respect of services rendered in a former action, their action against the executor of the client for the amount of their bill was dismissed.

AN appeal by the defendant from the judgment of McEvoy, J., at the trial, in favour of the plaintiffs, solicitors, in an action against the executor of Carrie L. McMillan, deceased, for the

amount of a bill of costs in respect of services to her in a certain action.

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April 14. The appeal was heard by LATCHFORD, C.J., RID-  
DELL, MASTEN, ORDE, and FISHER, JJ.A.

*H. L. Barnes*, for the appellant, argued that there was no evidence to shew that the deceased had retained the plaintiffs to oppose the motion made by Daniel Labadie for leave to appeal to the Privy Council. Nor was there evidence that the deceased's husband had been authorised by her to retain the plaintiffs on her behalf.

*M. L. Gordon*, K.C., for the plaintiffs, respondents, contended that there was sufficient evidence to shew the agency of the deceased's husband in the matter of retaining the plaintiffs on her behalf, and of his having done so.

May 15. LATCHFORD, C.J.:—There is not a scintilla of evidence in this case that the deceased *retained* the plaintiffs, in the proper and legal sense of the word, to oppose the application for leave to appeal to the Privy Council in the *Labadie* case. As it is only in reference to that opposition that the claim against her for costs is made, a reference appears to me quite unnecessary. That Mrs. McMillan applied for a bond for security for costs in an earlier proceeding before an Ontario court does not help the plaintiffs.

The appeal should be allowed with costs and the action dismissed with costs.

RIDDELL, J.A.:—This is an action by solicitors against the executor of a deceased woman for services as solicitors, in a protracted litigation.

The sole question before us for decision is as to the retainer, which is denied. At the trial at Sandwich before Mr. Justice McEvoy, that learned Judge gave judgment for the plaintiffs, holding that the retainer had been proved. The defendant now appeals.

The deceased never saw the solicitors, all the transactions between solicitor and client having been by her husband, who is now claimed by the plaintiffs to have been her agent in the premises. No written retainer was obtained, though an abortive attempt

App. Div. to obtain one was made on at least one occasion; the solicitors  
 1931. were content to go on upon the instructions of the husband; and  
 SALE AND there is not any satisfactory evidence that the deceased in any way  
 SALE ratified the retainer by the husband.  
 v.  
 McMILLAN. The text-books lay it down tersely and sententiously: "A writ-  
 Riddell, J.A. ten retainer is always advisable:" Cordery, *Law of Solicitors*, 3rd  
 ed., p. 72; and Lord Langdale, M.R., in *Allen v. Bone* (1841), 4  
 Beav. 493, says:—

"It is the duty of a solicitor to obtain a written authority from his client before he commences a suit. If circumstances are urgent, and he is obliged to commence proceedings without such authority, he should obtain it as soon afterwards as he can. An authority may however be implied, where the client acquiesces in and adopts the proceedings; but if the solicitor's authority is disputed, it is for him to prove it, and if he has no written authority, and there is nothing but assertion against assertion, the Court will treat him as unauthorised, and he must abide by the consequences of his neglect."

The husband, who is the defendant as executor of his deceased wife, was examined for discovery; but he was not asked as to his authority; we are informed that he was present at the trial, but was not called as a witness. So far as he is concerned, we have only statements and acts, and it is admitted that, where the fact of agency is concerned, "the mere acts or representations of the agent . . . are generally no proof against the" alleged principal: Phipson on Evidence, 4th ed., p. 74, and cases cited there, and pp. 93, 94, 110; *Everest v. Wood* (1824), 1 C. & P. 75.

With the natural desire that the solicitors should be paid for the work they have done—"the labourer is worthy of his hire"—we must be satisfied by evidence not conjecture that there was a real hiring before we can order payment to the labourer.

I am of opinion that the appeal should be allowed and the action dismissed with costs here and below.

This dismissal will not, of course, interfere with any right the solicitors may have against the husband personally; while the lesson to be learned by members of the profession may be salutary.

MASTEN, J.A.:—Were this an ordinary contract of employment, I would without question find a contract by the defendant

to pay for the services in question. But, as pointed out by my brother Riddell, the retainer of a solicitor has from time immemorial possessed peculiarities of its own necessitating special proof of employment. The evidence in this case, so far as it relates to the appearance before the Privy Council, fails to afford such proof of retainer as the law requires. I would therefore disallow the charges to that extent.

If differences arise regarding the quantum of the sum so disallowed, the matter should be referred to the taxing officer in Toronto to settle the amount.

I would limit our judgment to a declaration that the plaintiffs have failed to establish a retainer by the defendant in respect to services in the appeal to the Privy Council, leaving the respective rights of the parties prior to that appeal unaffected.

The appellant is entitled to the costs of this appeal.

ORDE and FISHER, JJ.A., agreed with LATCHFORD, C.J.

*Appeal allowed.*

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[APPELLATE DIVISION.]

PRICE V. HABERMAN.

1931.

May 15.

*Agency—Agent's Commission on Exchange of Properties—Special Agreement as to—Commission Payable upon "due Completion of the Exchange"—Allowance as upon Quantum Meruit for Agent's Services—Finding Set aside on Appeal—Whether Appeal Competent—Division Courts Act, R.S.O. 1927, ch. 95, secs. 118, 119—Claim and Counterclaim—"Sum in Dispute"—Jurisdiction.*

In a Division Court the plaintiff sued for \$200, commission for effecting the exchange of certain properties, and the defendant counterclaimed for \$120, part of a secret commission received by the plaintiff and not disclosed to the defendant. A writing was signed by the defendant agreeing to pay the plaintiff \$200 upon the "due completion of the exchange," and this was accepted by the plaintiff. An agreement for an exchange was obtained by the plaintiff, but there was no "due completion of the exchange." The Judge sitting in the Division Court thought the completion was prevented by the act of the defendant, and so gave judgment for the plaintiff for \$100 as upon a *quantum meruit* and dismissed the counterclaim:—

*Held*, upon appeal, that the counterclaim was properly dismissed on the merits.

By sec. 118 of the Division Courts Act, an appeal lies in an action where "the sum in dispute" exceeds \$100, exclusive of costs; but by sec. 119, "where a claim and counterclaim arise out the same

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transaction or occurrence and an appeal is brought from the judgment upon either, the judgment upon both shall be subject to review by the Court:—

*Held*, that both claim and counterclaim arose out of the occurrence of the employment of the plaintiff as agent by the defendant, and that the appeal lay by virtue of sec. 119.

*Per* RIDDELL and ORDE, J.J.A.:—The amount of the claim and counterclaim should not be added to determine “the sum in dispute:”

*Cossman v. Kehoe* (1922), 22 O.W.N. 9.

MASTEN, J.A., adhered to the view expressed in *Campbell v. McGregor* (1928), 61 O.L.R. 649, that “the sum in dispute” is the amount in dispute in the appeal as ascertained by the addition of the two cross-claims if both are in appeal.

*Held*, by the majority of the Court, that, as the special agreement made the commission payable upon an event which did not happen, no recovery as upon a *quantum meruit* could be had.

*Per* RIDDELL and ORDE, J.J.A., that, upon the evidence, the defendant was not to blame for the failure to complete the proposed exchange—the failure was the fault of the plaintiff, and the defendant’s appeal on that head should be allowed.

AN appeal by the defendant from the judgment of MORSON, Jun. Co. C.J., sitting in the First Division Court of the County of York, in an action for a commission for effecting an exchange of certain properties, finding in favour of the plaintiff for the recovery of \$100 as upon a *quantum meruit* for his services as agent, and dismissing the defendant’s counterclaim for \$120, being part of a secret commission received by the plaintiff and not disclosed to the defendant.

April 15. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

L. N. Sukloff, for the appellant, argued that the exchange had not been completed as called for by the contract, that the failure to complete was the plaintiff’s fault, and so the plaintiff’s action should be dismissed. The defendant’s counterclaim should have been allowed because it had been proved by evidence which was not rebutted by the plaintiff.

F. G. Gardiner, for the plaintiff, respondent, contended that there had been due completion of the exchange: *Haffner v. Cordingly* (1908), 18 Man. L.R. 1. There was no right to appeal to this Court because, as the claim and counterclaim were separate and distinct actions, the sum in dispute was only \$100: *Cossman v. Kehoe* (1922), 22 O.W.N. 9; sec. 118 of the Division Courts Act, R.S.O. 1927, ch. 95.

*Sukloff*, in reply, maintained his right of appeal, relying on sec. 119 of the Division Courts Act.

May 15. LATCHFORD, C.J.:—Appeal by the defendant against the dismissal of a counterclaim for \$120, and the entry of judgment against him for \$100 as a *quantum meruit* in proceedings to collect \$200 as commission payable under a written agreement.

So far as the appeal concerns the counterclaim, it was dismissed at the close of Mr. Sukloff's argument.

The commission sued for was based on a special agreement which made it payable upon the due completion of a proposed exchange of certain real properties—one owned by the defendant. The exchange was never duly or otherwise completed. As an agreement to pay such a commission must be in writing, and the only writing here makes the commission payable upon an event which did not happen, no recovery as on a *quantum meruit* can be had. The appeal in this aspect should be allowed and the action dismissed with costs in the Division Court.

As success is divided in this Court, there should be no costs of appeal.

RIDDELL, J.A.:—In an action in the First Division Court of the County of York the plaintiff sues for the sum of \$200, being commission to which he claims to be entitled for effecting the exchange of certain properties; after certain proceedings of no importance here, the claim was tried by his Honour Judge Morson, along with a counterclaim "for \$120, being part of a secret commission received by the plaintiff and not disclosed to the defendant."

His Honour dismissed the counterclaim, and gave judgment for the plaintiff for \$100 as on a *quantum meruit*. The defendant now appeals.

The facts are that the defendant, being desirous of obtaining an exchange of certain property, employed the plaintiff for the purpose, giving him a writing as follows:—

"Toronto, April 16th, 1930.

"Mr. W. A. Price,  
394 Bay Street,  
Toronto.

"Dear Sir:     *Re 128 Jameson Avenue Exchange.*

"This is to advise you that I agree to pay you the sum of \$200.00 in cash being your commission, in the exchange of the above property upon the due completion of the said exchange.

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App. Div. "I, W. A. Price, hereby agree to accept the above said amount  
1931. of \$200.00 in full of my commission.  
PRICE "W. U. Haberman."  
v. This was accepted though apparently not signed by the plain-  
HABERMAN. tiff.  
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An agreement for the exchange was obtained; as is correctly found by his Honour, there was no "due completion of the exchange;" but, as he thought the completion was prevented by the act of the defendant, he considered that the plaintiff should receive compensation on the basis of a *quantum meruit*.

We need not consider whether the doctrine of secret commission extends to the facts of this case, as on the merits the counterclaim was dismissed; and we cannot interfere with the judgment in that regard. Were the findings in the opposite sense, we should be called upon to consider the rule that an agent is not permitted to acquire any personal benefit in the course of his agency, and must account to the principal for every benefit and pay over to him every profit so acquired without the knowledge and consent of his principal: Bowstead on Agency, 7th ed., pp. 148, 149; Halsbury's Laws of England, vol. 1, pp. 189, 190, para. 405; and such cases as those cited there and in the Supplement, para. 405.

The counterclaim is of importance only as bearing upon the right of the defendant to appeal in respect of the claim of the plaintiff.

The Division Courts Act, R.S.O. 1927, ch. 95, by sec. 118 provides for an appeal to this Court "in an action or garnishee proceeding where the sum in dispute exceeds \$100, exclusive of costs;" and it is argued that, the claim and counterclaim being two distinct and separate actions, the "sum in dispute" is only \$100, and no more. Section 119, however, provides that:—

"Where a claim and counterclaim arise out of the same transaction or occurrence and an appeal is brought from the judgment upon either, the judgment upon both shall be subject to review by the court."

In the present case, both claim and counterclaim, in my view, arise out of the occurrence of the employment of the plaintiff as agent by the defendant, this not being a mere incident but the actual foundation of both. I am therefore of the opinion that an appeal lies by reason of this section. Whether, were the claim and counterclaim wholly distinct, the appeal would lie, we need

not consider; but I am not to be taken as assenting to the proposition that in such a case the amount of the claim and counterclaim should be added to determine the "sum in dispute." I do not, as at present advised, think that *Campbell v. McGregor* (1928), 61 O.L.R. 649, requires us so to hold, in view of the case of *Cossman v. Kehoe*, 22 O.W.N. 9, there cited. It will be seen that in *Campbell v. McGregor* the counterclaim asserted an original debt of \$103.55; and, though the defendant gave credit for \$47.15, the plaintiff disputed all original liability for the \$103.55, so that, in reality, the whole sum of \$103.55 was in dispute. This was pointed out by my brother Orde on the argument, and I see no reason to disagree. But I do not further discuss this point, as I think that the defendant has a right of appeal under sec. 119.

That the learned Judge was wholly justified in giving judgment for at least \$100, if the facts were as he supposed, is not and cannot be disputed—of course, he did not mean that he was at liberty to depart from the law and give judgment in accordance with what he thought was right though not legal, when he employed the terminology, "in accordance with equity and good conscience." The Court of Chancery was a "Court of Equity and Good Conscience," but it was bound by the decisions of the Courts of Law; and there is no foundation for the proposition which used to be jestingly stated by a Chief Justice, that "every County is entitled to its own law."

An appeal as to the plaintiff's claim being permissible under sec. 119, we are to see whether the finding of the learned trial Judge that the failure to complete the exchange was due to the fault of the defendant is right. From a careful examination of the evidence, assisted by the lucid arguments on either side, I am of the opinion that the defendant was not to blame for the failure of the proposed exchange to be completed—it was the fault, as I think is fairly established, of the other party. On that finding, the plaintiff's claim fails.

I am of opinion that the appeal against the plaintiff's claim should be allowed and the claim dismissed with the costs of the Division Court. Success being divided in this Court, there should be no costs of the appeal.

MASTEN, J.A.:—This was an appeal from a judgment of the First Division Court of the County of York in which the trial

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Judge dismissed the defendant's counterclaim for \$120; found that the plaintiff's claim on a special contract for the sum of \$200 could not be maintained; but allowed to the plaintiff \$100 as on a *quantum meruit*.

Some question arose in the course of the argument as to whether the case was appealable. I adhere to the view expressed in *Campbell v. McGregor*, 61 O.L.R. 649, to the effect that where there is a claim and counterclaim proper, in the same action, both of which are in appeal, "the sum in dispute" is the amount in dispute on the appeal as ascertained by the addition of the two cross-claims if both are in appeal.

On the hearing of the appeal we dismissed the appeal of the defendant seeking the allowance of his counterclaim, but reserved the question as to the defendant's appeal against the \$100 which had been allowed to the plaintiff in the court below.

I am clearly of opinion that in the present case the plaintiff undertook the work of acting as agent for the sale or exchange of the defendant's property on a misrepresentation by the defendant to him that the property was clear and free of obligation by way of prior option, and but for sec. 11 of the Statute of Frauds, R.S.O. 1927, ch. 131, the plaintiff would have been entitled on the footing of such misrepresentation to the allowance made to him by the court below. But sec. 11 provides as follows:—

"No action shall be brought to charge any person for the payment of a commission or *other remuneration* for the sale, purchase, exchange, or leasing of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorised."

The claim which has been allowed is a payment of a remuneration to the plaintiff for services rendered in connection with the sale, purchase, or exchange of real property. The condition contained in the written agreement which was signed precludes him from obtaining anything under that agreement, and there is no other agreement in writing signed by the defendant which permits the allowance of the \$100 in question.

The defendant's appeal must, therefore, be allowed.

I concur in the disposition of costs suggested by my brother Riddell.

ORDE, J.A., agreed with RIDDELL, J.A.; and FISHER, J.A.,  
with LATCHFORD, C.J.

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*Appeal dismissed as to the counterclaim and allowed as to the claim.*

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## [APPELLATE DIVISION.]

STEELE V. FERGUSON.

1931.

May 15.

*Negligence—Motor-vehicles upon Highway—Collision—Both Drivers Negligent—Injury to Passengers (Plaintiffs)—Contributory Negligence Act—Degrees of Fault—Contribution—Negligence Act, 1930, 20 Geo. V. ch. 27—Amendment—Rule 183—Terms—Costs.*

At the intersection of two streets in a city there was a collision between the plaintiff S.'s motor-vehicle, driven by himself, and containing four passengers, and the motor-vehicle of the defendant W.F., driven by the defendant D.F., and also containing four passengers. The plaintiff S. and two of his passengers brought this action in a County Court against W.F. and D.F., who counterclaimed for damages. The County Court Judge held that the sole negligence causing the collision was that of D.F., and gave judgment for the plaintiff S. for \$157 and for his two passengers for \$500 and \$200 respectively; and dismissed the counterclaim. The defendants appealed against the judgment, so far as it was in favour of S., admitting that the judgment in favour of the passengers must stand; and asked to have the amount which they admittedly must pay to the passengers reimbursed in part by S., the other negligent person, under the Negligence Act, 1930, 20 Geo. V. ch. 27:—

*Held*, upon the evidence, that both the drivers were negligent, and that the negligence of each contributed to the accident; consequently the Contributory Negligence Act, R.S.O. 1927, ch. 103, applied; S. was in fault to the extent of 60 per cent. and D.F. of 40 per cent.

The whole amount of the damages of S. being \$157, it was admitted that, if liable at all, he was liable for \$215; deducting the amount coming to S. from that payable by him, there was a balance against him of \$58, and that sum should be divided equally, so that he should pay the defendants \$29.

As to the claim that S. should contribute to the amounts payable to his passengers, in view of Rule 183, the defendants should be allowed to amend, on proper terms, by setting up this claim; and upon it they will be entitled to add to their judgment of \$29 the half of \$500 and \$200, namely \$350. The terms imposed should be depriving them of half the costs of the appeal, in which they are successful.

Special order as to costs.

AN appeal by the defendants from the judgment of THOMPSON, Co. C.J., in an action in the County Court of the County of York, in favour of the plaintiffs for the recovery of damages for injuries sustained by them in a highway collision between motor-vehicles, and dismissing the defendants' counterclaim for damages arising from the same collision.

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April 17. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

*C. C. Calvin*, for the appellants, argued that the learned trial Judge had not given proper consideration to the right of way of the defendant Daniel Ferguson. The plaintiff Walter Steele did not slow down on approaching the intersection, and was travelling at a speed greater than 10 miles per hour. This plaintiff's negligence was the proximate cause of the accident. In any event, this plaintiff was more to blame than the defendant Daniel Ferguson, and the defendants should be allowed to plead the Negligence Act, 1930, 20 Geo. V. ch. 27. The plaintiff Walter Steele should reimburse the defendants in part what they have to pay the plaintiffs.

*G. Hamilton*, for the plaintiffs, respondents, contended that the judgment below was right. The defendant Daniel Ferguson was wholly to blame for the accident. He opposed the defendants being allowed to plead the Negligence Act.

May 15. RIDDELL, J.A.:—The plaintiff Walter Steele was driving his car easterly on Fairfold-avenue, with his wife and two children and his aunt, his son with him in the front seat and his wife with a little girl and the aunt in the rear seat; the defendant Daniel Ferguson was driving his car northward on Ashdale-avenue, his sister with a child on her knee, her future husband and another in the back seat, the driver, we are told, having two girls in the front seat with him; at the intersection there was a collision, with injuries pretty generally distributed. The plaintiff Steele with the aunt and the wife brought an action against the driver and Wesley Ferguson, the owner of the car which Daniel had been driving; the defendants, in addition to denying liability, counter-claimed for damages.

At the trial before his Honour Judge Thompson in the County Court of the County of York, that learned Judge held that the sole negligence causing the accident was that of the driver, Daniel Ferguson, and gave judgment for Walter Steele for \$157, for the aunt for \$500, and the wife for \$200; and he dismissed the counterclaim.

The defendants appeal against the judgment, so far as it is in favour of Walter Steele, admitting that the judgment in favour of the passengers must stand. Moreover, at the hearing of the

appeal, they asked to be given the benefit of the recent Act (1930), 20 Geo. V. ch. 27 (Ont.), which we have in *Topping v. Oshawa Railway Co.* (1931), 66 O.L.R. 618, held applicable in the case of a passenger in one vehicle injured through the negligence of the driver of that and the driver of another vehicle. They ask to have the amount which they admittedly must pay to these two plaintiffs reimbursed in part by the other negligent person, the driver of the other car.

I have read and re-read the evidence, and I am quite convinced that both the drivers were negligent, and that the negligence of each contributed to the accident; consequently the Contributory Negligence Act, R.S.O. 1927, ch. 103, applies. Moreover, I think "that it is not, on the evidence, practicable to determine the respective degrees of fault;" and, consequently, I hold that each is liable for one-half the damages (sec. 3).

The whole amount of the damages of Walter Steele is \$157; it is admitted that, if liable at all, he is liable for \$215—a convenient way of framing the judgment is to deduct the amount coming to the plaintiff Walter from that payable by him, leaving a balance of \$58; divide that equally so that he will pay the said defendants \$29. As to these parties directly, success in the court below being divided, there should be no costs of the action up to and including the judgment below.

As to the plaintiffs the passengers, their judgment is not appealed against and will stand with their separate costs in the court below.

As to the claim made before us for the first time that Steele should contribute to the amount payable to the plaintiffs whose judgment is not interfered with, I think, in view of Rule 183,\* we should allow the defendants to amend, on proper terms, so that they will be entitled to add to their judgment of \$29 the half of the sums of \$500 and \$200, namely \$350. It seems to me that the proper terms to impose should be to deprive them of half of the costs of the appeal. They succeed in the appeal and would otherwise be entitled to the whole costs of the appeal.

In the result, judgment should be entered against the defend-

\* 183. A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made, upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining the real matter in dispute, and the giving of a judgment according to the very right and justice of the case.

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App. Div.   ants, for Margaret Steele for \$200 and for Jennie Steele for \$500,  
1931.       each with her costs of action; and for the defendants against Wal-  
STEELE     ter Steele for \$379 and half the costs paid by them to the success-  
v.         ful plaintiffs, as also half the costs of the appeal; no other costs to  
FERGUSON. be payable by any party.  
Riddell, J.A.

LATCHFORD, C.J., agreed with RIDDELL, J.A.

FISHER, J.A.:—Appeal by the defendants from the judgment of his Honour Judge Thompson, acting as one of the Judges of the County Court of the County of York.

The learned Judge found that the collision was due solely to the defendant Daniel Ferguson's negligence. With respect, I am of the opinion that the accident was due to the combined negligence of both drivers of the automobiles, and that the plaintiff Walter Steele was the greater sinner of the two.

The evidence is conclusive that the plaintiff-driver approached a through street intersection so negligently that on his own admission he did not see the defendant's car—which had the right of way—until it was within about two lengths of a car from him, and had he looked he would or could have seen the defendant's car approaching from the south about 40 feet south of Fairfold-avenue. His excuse for not seeing the defendant's car was because of a parked car on the west side of Ashdale-avenue, a short distance south of Fairfold. This excuse is an idle one, as a parked car could not possibly obstruct his view.

I find that the defendant's negligence was in the speed at which he approached the intersection, and in not keeping a careful outlook on the approaching traffic from the west. The defendant admitted that he did not see the plaintiff's car until he was about one length of a car from it, and had he looked, as he was bound to when approaching the intersection, he could have seen the plaintiff's car about 40 or 50 feet west of Ashdale-avenue, and should, in such circumstances, have had his car under control. If the defendant did not have a clear view of the approaching traffic from the west, as he contends, then it was his duty to reduce his speed as he approached the intersection. See *Luck v. Toronto Railway Co.* (1920), 48 O.L.R. 581.

I have read and agree with the judgment of my brother Riddell in which he finds that the plaintiff-driver and the defendant were

guilty of negligence in an equal degree; and I also agree that judgment, including the costs, should be entered for the different parties and for the amounts as found by my brother Riddell.

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MASTEN and ORDE, J.J.A., agreed with FISHER, J.A.

*Appeal allowed.*

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[APPELLATE DIVISION.]

DEVINS v. DEVINS.

1931.

March 10.

May 15.

*Parties—Addition of Persons as Defendants upon their Application after Judgment—Practice—Rule 301—Consent Judgment—Fraud upon Court.*

In this action the plaintiff claimed dower in certain lands, the defendant being her son. On the 29th January, 1931, judgment was given dismissing the action. The defendant, in October, 1930, sold the lands to J.C. and M.C. Notice of appeal from the judgment was served by the plaintiff; then, by some arrangement to which J.C. and M.C. were not parties, counsel for the defendant appeared in Court (the Appellate Division) and, without disclosing the sale, consented to the appeal being allowed and judgment directed to be entered declaring the plaintiff entitled to a conveyance to her for life of part of the lands. A judgment was pronounced accordingly; but, upon this coming to the knowledge of J.C. and M.C., they applied for and obtained a stay of the judgment. On the 25th February, 1931, an order was made by the Master, upon the application of J.C. and M.C., adding them as parties defendant. This order was reversed by a Judge in Chambers, and J.C. and M.C. appealed:—

*Held*, that the appeal should be allowed and the Master's order restored.

Rule 301 is applicable after judgment: *Chambers v. Kitchen* (1895), 16 P.R. 219, 17 P.R. 3, followed.

The English practice is quite different from the Ontario practice. *Semble*, the consent judgment was a fraud upon the Court.

AN appeal by the plaintiff from an order of the Master, dated the 25th February, 1931, adding John J. Castator and Margaret E. Castator as parties defendant.

March 6. The appeal was heard by SEDGEWICK, J., in Chambers.

*James Gilchrist*, for the plaintiff.

*G. T. Walsh*, K.C., and *M. C. Hooper*, for John J. Castator and Margaret E. Castator.

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March 10. SEDGEWICK, J.:—This action was brought in November, 1927, by Caroline Elizabeth Devins against her son George John Devins claiming that she is entitled to have certain lands assigned to her as her dower interest in her husband's lands, or, in the alternative, for a reference to assign her dower.

Judgment dismissing her action was pronounced on the 29th January, 1931. Notice of appeal to the Appellate Division was given on behalf of the plaintiff by her solicitor. The defendant was represented up to the 16th February, 1931, by his solicitors Messrs. Skeans & Hooper.

Apparently in October, 1930, the defendant sold the lands in question to John J. Castator and Margaret E. Castator, who have been added as defendants in this action by the order appealed from. John J. Castator is apparently the brother of the plaintiff. The Castators went into possession in October, 1930. The deed was not registered until the 6th February, 1931.

On the 16th February, 1931, a notice changing the defendant's solicitors was served, and on the same day, pursuant to a consent filed, the Appellate Division allowed the plaintiff's appeal and declared that the plaintiff was entitled to have conveyed to her for life certain lands, part of the lands sold by the defendant to the Castators, and to have \$1,250 paid to her as damages for detention of her dower and to be paid the costs of action and appeal. Apparently a writ of possession issued, and the sheriff went out to put the plaintiff in possession of the lands. The Castators immediately moved before the Appellate Division which made the order allowing the appeal. The Appellate Division has stayed all proceedings under its judgment.

I assume that the Castators desire to move in the action to have the consent judgment of the Appellate Division set aside. They have also commenced an action against the original parties to this action, claiming that the consent judgment of the Appellate Division is not effective against them as purchasers of the lands in question. In that action they obtained an interim injunction restraining proceedings against them under the judgment of the Appellate Division. I have not been informed whether or not that injunction is still in effect. At any rate it seems to be possible for the Castators in that action to assert any rights they may have in respect of the lands they have bought. It is not necessary for them in asserting those rights to interfere with any settlement

made between Mrs. Devins and her son. George Devins is apparently claiming in the Castator action that the deed of the lands was improperly delivered to the Castators. The same solicitors were apparently acting for the Castators buying the land and for George Devins selling the land and defending this action. The deed was taken out of escrow after the trial-judgment herein, and before the time for appeal had expired. George Devins also can assert in that action all claims he has against the Castators. The present action is not one in which these opposing claims can be worked out without entirely new pleadings and a new trial.

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I have not been furnished with any authority for adding parties defendant on their own application after judgment in the action. I have not been able to find such authority.

The Master's order adding defendants will therefore be set aside. No costs to either party either here or below.

The Castators appealed from the order of SEDGEWICK, J.

April 17. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*G. T. Walsh*, K.C., for the appellants, argued that they should be added as parties. They would be bound by the judgment against the defendant, as they got their title to the lands through him. If the judgment stands they will lose a large part of their lands. They should not be bound by a consent given by another without their knowledge. Under Rule 301\* they are entitled to be added after judgment: *Chambers v. Kitchen* (1894), 16 P.R. 219.

*James Gilchrist*, for the plaintiff, respondent, contended that the appellants had no right to be added as defendants. They can assert any rights they have in respect of the lands they have bought in the action which they have commenced against the original parties to this action: *Jonesco v. Beard*, [1930] A.C. 298; *Dodds v. Harper* (1916), 37 O.L.R. 37; *Broom v. Pepall* (1911), 23

\* 301. Where a change or transmission of interest of liability has taken place or where by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and the new party may be obtained on *præcipe*.

App. Div. O.L.R. 630; *Attorney-General v. Corporation of Birmingham*  
1931. (1880), 15 Ch. D. 423.

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*G. H. Gray, for George J. Devins, amicus curiæ.*

May 15. RIDDELL, J.A.:—This is an action of dower, the plaintiff, a widow, claiming dower in certain lands mentioned, the defendant being her son; judgment was given on the 29th January, 1931, dismissing the action, the writ being tested in November, 1927. After action begun and before judgment, the defendant, in October, 1930, sold the lands in which dower was claimed to John J. and Margaret E. Castator, the former being the brother of the plaintiff.

Notice of appeal was served by the plaintiff; then, by some arrangement to which the Castators were not parties, counsel representing the defendant appeared in Court, and, without disclosing the sale to the Castators, consented to the appeal being allowed and judgment directed to be entered declaring the plaintiff to be entitled to a conveyance to her for life of part of the lands in question.

Upon this coming to the knowledge of the Castators, they applied to this Court and obtained a stay of our judgment, so obtained by consent, behind their backs.

The Castators, failing to obtain on *præcipe* an order adding them as parties to the action, applied to and obtained from the Master, on the 25th February, 1931, an order adding them as parties defendant; this order was reversed by Mr. Justice Sedgewick, on the 10th March; the Castators, having obtained leave to appeal, moved us by way of appeal from Mr. Justice Sedgewick's order.

That they are substantially interested in the matter is quite obvious; they claim under the original defendant, and are bound by the judgment against him; consequently, if the judgment entered in the action is to stand they will be deprived of a considerable part of the land which they bought from the defendant, *pendente lite*: that the consent judgment was in fraud of the Court is equally obvious; and it would be a travesty of justice to hold them bound by a consent given by another behind their backs. But these considerations are not conclusive of their right to be added as parties in this action; we must look at the practice of the Court to see how far their request can be legally acceded to.

The present Rule 301 is substantially the same as the Rule 622 in force when *Chambers v. Kitchen* (1895), 16 P.R. 219, 17 P.R. 3, was decided by the Court of Appeal. This decision, by which, of course, we are bound, makes the Rule applicable after judgment. The facts were that a judgment had been delivered in default of defence, and, after the death of the defendant, his executor applied for an order of revivor. Notwithstanding the objection that judgment had been entered, Mr. Justice Street, than whom there never was a greater master of practice in our Courts, held that, as it was necessary that the defendant should be allowed to carry on the proceedings to set aside the judgment, he should have his order making him a party to the action. This was affirmed by the Court of Appeal; and I am unable to understand why the applicants here are not in precisely the same position.

What may be their rights on being added, we need not consider, the sole matter before us being their right to become parties to the action.

Such cases as *Jonesco v. Beard*, [1930] A.C. 298, are not in point, the practice in England being wholly different in this regard from ours, as in pointed out in Holmsted's *Judicature Act*, 4th ed., p. 1147.

I would allow the appeal with costs throughout.

LATCHFORD, C.J., and ORDE and FISHER, J.J.A., agreed with RIDDELL, J.A.

MASTEN, J.A.:—Having had an opportunity of perusing the judgment which has been prepared by my brother Riddell, I agree in the conclusion at which he arrives and in the reasoning by which it is supported. I only desire to add a reference to the case of *Carson v. Middlesex Mills Ltd.* (1920), 18 O.W.N. 79—a decision of the Appellate Division, where a somewhat similar practice is incidentally referred to and laid down.

*Appeal allowed.*

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1931.

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v.

DEVINS.

Riddell, J.A.

## [APPELLATE DIVISION.]

1931.

HILL V. SUNNY LAND CAFE &amp; CO.

May 15.

*Practice—Default Judgment in County Court—Motion to Set aside—Question whether Writ of Summons Served on Defendants—Order Setting aside on Terms—Appeal from—Jurisdiction—County Courts Act, sec. 37(1)—Trial of Issue as to Whether Defendants Served with Writ of Summons—Stay of Proceedings.*

Under sec. 37(1) of the County Courts Act, R.S.O. 1927, ch. 91, an appeal lies from an order of a Judge of a County Court setting aside (upon terms) a judgment for the plaintiff on default of appearance. *F. J. Castle & Co. Ltd. v. Kouri* (1909), 18 O.L.R. 462, referred to. Upon the appeal, it was held, that the question of fact whether the defendants had actually been served with the writ of summons should not be tried on affidavits—the proper course was to direct the trial of an issue upon oral evidence.

*Smith v. Ask* (1849), 5 U.C.R. 497, followed.

The order appealed from was set aside, and proceedings on the judgment were stayed until after the determination of the issue and of any application to be made on the basis of such determination.

AN appeal by the defendants from an order of LEE, Jun. Co. C.J., in an action in the County Court of the County of York, setting aside a judgment entered upon default of appearance, but imposing conditions upon the defendants.

May 1. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and FISHER, JJ.A.

*Fraser Raney*, for the appellants, argued that the learned County Court Judge should have set aside the judgment without terms, as having been obtained irregularly, or in the alternative should have directed the taking of evidence *vivâ voce* to determine the issue. The learned Judge had no jurisdiction to impose the terms which he did.

*J. L. Shannon*, for the plaintiff, respondent, contended that the appellants had waived their right to raise this objection by being willing to accept an order setting aside the judgment on payment of all costs thrown away, and only objecting to the term imposed of paying into court \$200 as security for costs.

May 15. The judgment of the Court was read by RIDDELL, J.A.:—In this action in the County Court of the County of York, judgment on default of appearance was signed on the 17th December, 1930, and a writ of execution thereon was placed in the hands of the Sheriff of the County of York; the defendants moved before

the presiding Judge in Chambers to set aside the judgment and proceedings thereon, on the ground that neither of the defendants had been served with the writ of summons. On this application, both defendants swore that they had not been served with a copy of the writ, while the solicitor for the plaintiff swore that he had personally served them both, giving circumstances and times. The defendants also swore to a good defence on the merits. An affidavit was also filed that the defendants had executed a bill of sale of their business property on the 26th December, and that this had been registered on the 10th January, 1931.

The learned County Court Judge on the motion made an order that, upon payment to the plaintiff's solicitor, for the plaintiff, of all costs thrown away and payment into court of \$200 as security for the plaintiff's costs, the judgment and *fi. fa.* should be set aside. The defendants now appeal.

We held that under the County Courts Act, R.S.O. 1927, ch. 91, sec. 37(1), the appeal was permissible; *cf. F. J. Castle & Co. Ltd. v. Kouri* (1909), 18 O.L.R. 462.

On the merits, the Court has, except in extraordinary cases, consistently refused to try questions of fact on affidavit—as early as *Smith v. Ask* (1849), 5 U.C.R. 497, the practice is so stated; and there has never been a variance from it. Were it then to be determined whether service was actually effected, the proper course was to direct an issue to be tried on oral evidence.

If the fact is that the defendants were not served, they have the legal right, of which no court should deprive them, of having the judgment, etc., set aside with costs; if, on the contrary, they were so served, they ask for the indulgence of the Court; and the order appealed from may, on the facts, be proper.

We determine nothing as to the result in case it be found that the defendants were served; our order is that the appeal be allowed with costs and the order appealed from set aside with costs. For the order of the County Court Judge is to be substituted an order directing the trial of an issue in the County Court (York), in which the plaintiff shall be plaintiff and the defendants defendants, and the question to be tried shall be whether they were served with a copy of the writ of summons; costs of this issue to be in the discretion of the trial Judge, either party to have the right to a trial by jury, otherwise the issue to be tried by the County Court Judge.

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LAND CAFE  
& Co.

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In the meantime, proceedings on the judgment to be stayed until the determination of the issue and of any application to be made on the basis of such determination.

*Appeal allowed.*

[McEVOY, J.]

## KINNEY V. LOCKWOOD CLINIC LTD.

1931.

May 18. *Physicians and Surgeons—Unsuccessful Operation on Patient—Decision of Patient to Have Operation Founded on Advice of Medical Officers of Hospital Corporation—Failure to Impart Information as to other Courses—Breach of Duty—Damages.*

The plaintiff, having a swelling on the palm of her right hand, consulted the defendant L., a physician and surgeon, and the manager of the defendant hospital, an incorporated body, and was by him introduced to the defendant S., also a physician and surgeon, and an employee of the defendant hospital, and advised by L. to be guided by S.'s advice. S. diagnosed the ailment as "Dupuytren's contraction" and advised the plaintiff to have an operation at once, telling her that the operation was simple. L. advised her to submit to the operation and do so promptly. The plaintiff, acting upon this advice, and believing that the operation was simple, submitted to it, and it was performed by S. at the hospital, after the lapse of a day or two. The fascia was removed from the hand; but the result was not satisfactory, the hand was not straight and appeared to be in a worse condition than it would have been had there been no operation:—

*Held*, that, the relationship of physician and surgeon on the one side and of patient on the other side having been established, it was the duty of the defendants to enlighten the patient's mind as to what her ailment was, as to what were the risks of operating promptly, of delaying the operation, or of not operating at all; and to secure from the patient a decision as to which course was to be followed; and, unless the surgeon, with his special skill and knowledge, discharges the duty which he owes of placing the patient in a position to make a decision, the surgeon, who is employed and paid because of his special skill and knowledge, has failed to perform his duty, and is liable in damages for untoward results.

Where the surgeon minimises the danger of the treatment to induce the patient to proceed, and refrains from explaining the advantages of an alternative course well known to him, he brings himself within the field of liability.

The facts here brought the defendants within that field. *Slater v. Baker and Stapleton* (1767), 2 Wils. 359, and *Nocton v. Lord Ashburton*, [1914] A.C. 932, followed.

If the surgeon assures the patient of results of which he cannot speak with certainty, he must be taken to have spoken recklessly, and is liable. *Hedin v. Minneapolis Medical and Surgical Institute* (1895), 64 N.W. Repr. 158, referred to.

The hospital corporation, as well as the individual defendants, *held* liable, following *Lavere v. Smith's Falls Public Hospital* (1915), 35 O.L.R. 98.

If the patient, as she said, had received the advice which it was the duty of the surgeons to impart, she would not have had the operation at all, and for this failure of duty, resulting in damage to her hand, she was entitled to recover damages.

1931.

KINNEY  
v.LOCKWOOD  
CLINIC LTD.

AN action brought by Mary Henrietta Kinney, a married woman, against Lockwood Clinic Ltd. and Ambrose L. Lockwood and Warren O. Stoddard, physicians and surgeons, for \$10,000 damages for injuries sustained by her by reason, as she alleged, of the negligent conduct of the defendants in respect of a surgical operation performed upon her person by them and a mistake in diagnosis and in advice given and in other respects.

The action was tried before McEvoy, J., without a jury, at Port Arthur.

*A. J. McComber*, K.C., for the plaintiff.

*D. L. McCarthy*, K.C., for the defendants.

May 18. McEvoy, J.:—In this action Mrs. Henrietta Kinney alleges in her statement of claim that she is a married woman living at Port Arthur, Ontario; that the defendant company is an incorporated company, operating a medical and surgical clinic at Toronto; that the defendant Ambrose L. Lockwood is a physician, an officer of the said clinic and manager thereof; that the defendant Warren O. Stoddard is a physician, a member of the said clinic and an employee thereof; and that the said Lockwood formerly operated upon the plaintiff for goitre.

This much of the plaintiff's allegations is admitted.

The plaintiff alleges further that on the 10th November, 1929, she consulted the defendant Lockwood with reference to a swelling on the palm of her right hand; that Lockwood examined her hand and referred her to the defendant Stoddard and advised and urged her to act on the advice of Stoddard; and that thereafter, up to the time of the operation upon her hand, the defendants Lockwood and Stoddard co-operated in treating the plaintiff and in advising her with regard to the said operation; that Stoddard was called by Lockwood to interview the plaintiff; that Stoddard examined the plaintiff's hand and diagnosed her ailment as "Dupuytren's contraction," and strongly urged the plaintiff to have the swelling in her hand removed by a surgical operation, explaining that it would be a simple matter to remove it then and that her hand would be all right in three days.

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The following day the plaintiff again went to Dr. Stoddard and told him that, in view of the fact that he had stated that if an operation was performed her hand would be all right in three days, she had decided to undergo the operation; that the defendant Stoddard then stated that her hand would be all right in three weeks, if she permitted him to operate, explaining that hot "soaks" and massage treatment after the operation would take up part of the three weeks.

The plaintiff further alleges that, upon this assurance by the defendant Stoddard that the operation would be a simple one, that her hand would be all right in three weeks, and believing the same and having confidence in the advice of the defendant Lockwood and relying upon them both, and believing that Stoddard, as represented by Lockwood, was an expert operator in this kind of a case, she consented to have the operation done, and the defendant Stoddard operated upon the plaintiff's hand on the 10th November, 1929.

The plaintiff further alleges that the operation was not successful and that it ended in great and permanent injury to her hand; that she cannot fully open or close her hand; that all the fingers are permanently bent inward; that the third finger is permanently bent inward more than the other fingers; that the hand and its wrist are much swollen; that the second finger and wrist pain almost all the time; and that, when the fingers are pressed to close or open the hand, there is considerable pain.

The plaintiff further alleges that upon medical advice she has at great expense had massage treatment for her hand, that such treatment must be continued indefinitely, and that she has largely lost the use of her hand, which loss will be permanent.

The plaintiff then alleges that the defendants Lockwood and Stoddard "negligently refrained from informing her before said operation was performed, as it was their duty to do, that an operation for Dupuytren's contraction is serious, precarious, and dangerous, and one which might prove and in a large percentage of other cases has proved unsuccessful and caused permanent injury, even when performed by the most skilful surgeon," and that "the defendants Lockwood and Stoddard falsely and recklessly, without caring whether it was true or false, or without reasonable grounds for believing it to be true, represented to her that the said operation was simple and that her hand would be all right in three

weeks, when they knew or ought to have known that an operation of this nature might, and in a large percentage of cases has, proved unsuccessful and caused permanent injury;" and that, if the defendants Lockwood and Stoddard or either of them had advised her of the seriousness of the operation, as it was their duty to do, she would not have submitted to the operation; and that, the defendants Lockwood and Stoddard, being servants and agents of the defendant corporation, that corporation is liable for the alleged wrongful acts of the two individual defendants.

The plaintiff claims \$10,000 damages.

The defendants say, in their statement of defence, that Lockwood and Stoddard did not "falsely, recklessly, or otherwise represent to the plaintiff that any operation was simple, or that recovery was certain within a definite time," nor did either of them urge her to have her hand surgically treated; that Lockwood, after examining the plaintiff's hand, "diagnosed its condition" and "told the plaintiff that the disability affecting it was progressive in character and that the recognised treatment was surgical; that Lockwood then introduced the plaintiff to Stoddard and advised her "to be guided by his advice;" that Stoddard reaffirmed the statements of Lockwood and told the plaintiff that the trouble "would be progressive, that the only hope for recovery lay in surgical treatment, that most patients so treated did recover, and that the plaintiff should be in the hospital for three or four days only if her temperature were normal, and that, if proper exercises and massage were taken, she should be able to begin to use her hand in about three weeks' time from the operation;" that subsequently the plaintiff saw Lockwood and "asked him if he thought that she would be doing the right thing in having an operation upon her hand, and the defendant Lockwood answered in the affirmative; that, save as aforesaid, the defendants made no representations *as to the condition* of the plaintiff's hand;" that the only duty of the defendant hospital, if any, "was only a duty to exercise reasonable care in the employment of persons to advise the plaintiff, and it is not otherwise responsible for the acts of such persons."

The defendants severally submit that the action should be dismissed.

When the case was approaching the time of its trial, the defendants requested that they be, for the saving of expense, allowed to examine certain defence witnesses in Toronto. The plaintiff

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agreed to this, and accordingly, on the 29th November, 1930, five witnesses were heard on behalf of the defence; namely, Drs. Lockwood, Stoddard, Galley, Starr, and Robertson, and Miss Dorothy Elliott, and the shorthand notes of this evidence was agreed to be extended for the use of the court and the parties upon the trial, and this was done and the report of this evidence is included among the papers returned with the record in this case.

The plaintiff in this case says, in effect, "If you, my surgeons, had done your duty to me, your patient, I would not have had this unfortunate operation done at all."

Upon anxious and prolonged consideration I have arrived at the conclusion that there are in the end, for the purpose of deciding the question of liability, two questions of law to be decided and one question of fact.

The first question of law to be determined is whether upon the facts of this case there was cast upon the surgeons, the defendants, any duty to explain to the patient the nature of her ailment, the risks involved in promptly submitting to an operation for that ailment, including an explanation of the risks involved in not submitting to an operation promptly or at all; and whether the surgeons were in duty bound to enlighten the patient's mind so as to put her in a position to decide upon her course and not to operate upon her until she did decide.

I am of opinion that in this case, the relationship of physician and surgeon on the one side, and of patient on the other side, having been, as I hold it was, established, the duty of the defendants was to enlighten the patient's mind in a plain and reasonable way as to what her ailment was, as to what were the risks of operating promptly, what were the risks of delaying the operation, and what were the risks of not operating at all. Having discharged that duty, it was the duty of the surgeons to secure from the patient a decision or a consent as to what course was to be followed, and if that decision or consent is not had and the surgeons operate in a case like this and the operation turns out badly and damage ensues, the surgeons are liable. There is such a relationship established between a person of such special skill and knowledge and a person of no skill and knowledge, upon the essential facts required for the making of a decision, that, unless the person with the special skill and knowledge discharges the duty which he owes of placing the patient in a position where the patient

may make a decision upon such known grounds as are well known to the surgeon, that person, when he is being employed and paid because of his special skill and knowledge, has failed to perform his duty, for which failure of duty our law, in my opinion, makes him liable in damages for untoward results.

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The further question of law is whether or not the surgeon's duty under our law is such that the surgeon is bound only to bring reasonable skill and efficiency to his task and to act honestly and in good faith in order to escape liability, or whether, in order to fix him with liability, the patient must go further and shew deceit upon the part of the surgeon. In my opinion, where the surgeon plainly and knowingly minimises the danger of the treatment to induce the patient to proceed, and plainly and knowingly refrains from explaining to the patient the advantages and disadvantages of an alternative course well known to the surgeon, he then brings himself within the field of liability.

Do the facts in this case bring the defendants within this field? See *Slater v. Baker and Stapleton* (1767), 2 Wils. 359; and see *Nocton v. Lord Ashburton*, [1914] A.C. 932, where the House of Lords point out that a plaintiff may have relief upon a footing of breach of duty arising from a fiduciary relationship established between solicitor and client; and it is my opinion that a relationship similar in effect arises between surgeon and patient. In addition, if the surgeon assures the patient of results of which he cannot speak with certainty but must be taken to have spoken recklessly, he is liable. See 48 *Corpus Juris*, p. 1133, para. 127; *Hedin v. Minneapolis Medical and Surgical Institute* (1895), 64 N.W. Repr. 158. As to the liability of the incorporation, see *Lavere v. Smith's Falls Public Hospital* (1915), 35 O.L.R. 98.

Upon the evidence adduced I proceed to find the facts. The plaintiff about four or five years before the date when she attended at the Lockwood Clinic, as hereinafter related, had been operated upon by Dr. Lockwood for goitre, and the plaintiff had confidence in Dr. Lockwood and the clinical hospital which he operates in Toronto.

In 1928, in the fall, the plaintiff observed a slight lump on the palm of her right hand near the fingers. She became anxious about this lump, and in playing golf she held her club in a manner to avoid, as much as possible, rubbing the club against this lump. In April of 1929 she became so alarmed about this lump that she

McEvoy, J. consulted Dr. Powell of Port Arthur, her home town. She was  
1931. alarmed lest the lump might be cancerous. Dr. Powell examined  
KINNEY her hand and expressed to her the opinion that it was of no serious  
v. importance and said that it was probably a cyst. (Dr. Powell,  
LOCKWOOD after the plaintiff had consulted the doctors at the Lockwood clinic  
CLINIC LTD. and had had the ailment diagnosed as a "Dupuytren's contraction"  
and had had it surgically removed, told the plaintiff that he knew  
what her trouble was when he had examined her hand in April,  
1929, but refrained from telling her).

In November, 1929, the plaintiff, on account of family bereavement, found it necessary to visit Toronto. While she was in Toronto she decided to consult Dr. Lockwood about the lump in the palm of her right hand. She did consult Dr. Lockwood. Her interview with Dr. Lockwood was short. He looked at her hand but he did not reveal to her what his diagnosis of her ailment was. He did however say to her that he wanted her to see Dr. Stoddard, and he rang for Dr. Stoddard, who was an orthopædic surgeon in the employ of the Lockwood Clinic Corporation. Dr. Lockwood introduced her to Dr. Stoddard and told her to rely and act upon the advice that Dr. Stoddard might give her.

Dr. Stoddard on this first interview examined her hand, diagnosed the ailment as Dupuytren's contraction, and advised her to have an operation at once. He told her the operation was simple and that she would be out in three days, and he says that he explained to her that the operation consisted of removing the fascia from the palm of her hand. The plaintiff said she would take time to consider whether she would submit to the operation or not. She saw her mother and discussed the matter and she saw Dr. Lockwood some time before she finally had the operation, and asked him as to the wisdom of submitting to the operation, and he advised her to submit to the operation and do so promptly. Whether this interview with Dr. Lockwood was before or after her second interview with Dr. Stoddard is not quite plain to me upon the evidence, but it was before she had the operation. The day following her first interview with Dr. Stoddard she came back to the hospital at about 2.30 in the afternoon. She saw Dr. Stoddard and she asked him what he meant by saying she would be all right in three days after the operation. He told her that she would be through with the operation and in a condition to leave the hospital in three days, but that she would have to return to the hos-

pital periodically, probably daily, for about three weeks for the application of "hot soaks," the massaging of her hand, limbering and bending of her fingers to "supple them up."

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I am not able to find on the evidence that anything else substantial was communicated to the plaintiff by either of the two doctors before the operation was performed. Indeed they plead and contend that they have, in the circumstances of the case, no duty to impart further information than they did, and deny that they told the plaintiff that the operation was simple. I find that they did in effect tell the plaintiff that the operation was a simple one. In a day or two the plaintiff was admitted to the hospital without further instruction or enlightenment; and Dr. Stoddart, under a general anæsthetic split, opened the skin on the palm of her right hand, laid it back and removed the fascia from the palm of her hand, leaving the general underlying structures of the palm of her hand intact; then he replaced the skin and bound up the hand. There is no attack upon the skill with which this work was done. I find as a fact that the plaintiff's hand was not injured by a fall during convalescence.

When the plaintiff consulted Drs. Lockwood and Stoddard, they both knew that the operation which they proposed to perform upon her hand was not a simple operation, but that it was an intricate, delicate, and complicated operation, requiring special skill, and one which ought not to be done by a surgeon who had not had special training for that work, but that it was not an operation involving fatal results. They knew, too, that a considerable percentage of such operations were not successful. They knew that Dupuytren's contraction was a progressive disease, that its rate of progression varied very much in different cases. They knew that a Dupuytren's contraction might, in a matter of a year or perhaps less, result in such an amount of contraction that the fingers of the hand would be brought down so that the hand would be practically closed. They knew also that in other cases the sufferer might have a comparatively useful hand for a period of 10 or 20 years. The plaintiff was about 50 years of age. They knew that too. They did not inform themselves as to whether the plaintiff's case was one in which she might have a comparatively useful hand for 10 or 20 years or not, and they did not so inform the plaintiff. They did not inform the plaintiff that there were at least two courses open to her, one, that she might have her

McEvoy, J. hand kept under observation for a time to ascertain whether or not her case was one of rapid progression and that it might be wiser to determine that fact by observation, and that the other course was to operate at once.

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The evidence leave no doubt in the mind that the doctors did not impart to the patient vital information necessary for her to have in order that she might exercise any reasonable judgment upon the question which she carried away with her at the end of the first interview, namely, whether she would submit to the operation upon her present visit or not, which question she did not in fact determine until the close of the second interview with Dr. Stoddard; they did assure her that the operation was a simple one, and the plaintiff believed that statement and acted upon it.

I hold as a matter of law that it was the duty of the surgeons, when they accepted the plaintiff as their patient, to inform her as to the seriousness of her submitting to the operation at that time, and of the fact that the disease was of such a character as that it might not for a number of years cause her much suffering or inconvenience; and that the surgeons were not entitled to operate upon her hand until they had put that matter with perfect frankness and plainness before her, and then had her decision that she would or would not submit to the operation at that time. In holding this to be the law I am not forgetting at all that this particular disease is one which with more or less rapidity results in folding the fingers of the hand into the palm of the hand, making almost a fist of the hand; and I am not forgetting that, as the disease progresses, the skin of the palm of the hand becomes wrinkled and shortened in length from the wrist to the base of the fingers, and that for that reason, after the disease has closed the hand to a considerable amount, the amount of skin available to cover the palm of the hand, when it is straightened out after the operation, will not be enough to reach from the base of the fingers to the top of the palm of the hand.

I find as a fact that all that is so, and that there are advantages in submitting early to an operation. I, however, hold that it is for the patient to decide, having been properly informed by the surgeon as to the whole situation, whether the patient will submit now to the operation, or whether the patient will wait and ascertain whether his Dupuytren's contraction is one of the rapidly progressing kind, or one of the slowly progressing kind;

and that, had the surgeons in this case frankly stated to the patient what they knew as to the seriousness of the operation, the chances of success of the operation, and the advantages that might accrue by not having the operation until a later period, they would not be liable. I hold, too, that that must lie with the patient and not with the surgeon to decide, and if the surgeon undertakes to determine that matter for the patient, as he did in this case, without informing the patient, and, after having informed the patient, procures the patient's consent, and damage ensues, the surgeon, in my opinion, is liable for damages.

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In this case this view of the law does not at all mean that the horrible details of the operation must be told to the patient, nor does it mean that in every case the surgeon must make such a frank and fair revelation as I have indicated. One can easily conceive a case where the nature of the illness or the condition of the patient is such that it would not be wise or necessary in law to enlighten the patient's mind, or to try to enlighten the patient's mind; but in a case like the one at bar there is no reason that I can see, and no reason has been suggested upon the evidence or in argument, why the plaintiff should not have been given an opportunity, after having been fully informed, to make her election as to whether she would submit to the operation at once, as she was advised to do, or whether she would, as one of the doctors put it in the witness-box, keep her Dupuytren's contraction, and mayhap be much happier with it than she would with the hand she now has.

At one stage of the matter it was suggested that the operation was a successful operation, but upon the whole body of evidence it must be held that the operation was a very unsuccessful operation and the result very unsatisfactory. As one of the defendants says, it was successful in the sense that they succeeded in removing the facia from the palm of the hand, and the same might be said of the amputation of a finger in which some infection was put at the operation—the finger would be successfully amputated—but the fact that the patient lost the hand by gangrene afterwards would prevent one from saying that that was a successful operation.

The patient's hand has been a source of pain and suffering and anxiety to her ever since the operation. It is now far from straight, and would appear as though it were in a much worse condition than it would have been if no operation had been had.

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When Dr. Stoddard first saw the hand, the patient was able to straighten it out to the full length of all the fingers, and she could do most ordinary operations with her hand. Now her hand is sore and stiff, partly closed, painful, and disfigured. If she had received the advice which it was the duty of the surgeons to impart, she says she would not have had the operation at all, and she claims damages of \$10,000 for this failure of duty on the part of the defendants resulting in damage to her hand.

There will be judgment against the defendants for the plaintiff. I assess the damages at \$3,000. The plaintiff should have her costs.

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*Will—Provision for Widow—One-third of Income from Blended Fund to be Paid to her during Life or Widowhood—Whether Widow Put to her Election between that and her Dower—Motion for Determination of Question—No Express Declaration that Gift in Lieu of Dower—Costs.*

The testator was a widower when he made his will on the 6th February, 1929. He then had four children, all infants. The will was made in contemplation of marriage, and the intended marriage took place shortly afterwards. He died on the 31st March, 1929, leaving the widow and the four children surviving him. After directing payment of his debts and funeral and testamentary expenses, he devised and bequeathed his whole estate, real and personal, to his trustees in trust to convert into money and to invest the proceeds and apply the net income "to pay to my intended wife, L.M.K., should she become my wife, one-third of said net income . . . so long as she may live and (or) not remarry;" the balance of the income to be applied for the benefit of the children. He then directs that the corpus of the estate shall be divided equally among the children who survive him, upon their attaining the age of 25 years, and that, as the children respectively receive their shares of the corpus, they shall cease to participate in the income. Then followed this clause: "Provided that the portion of my said estate set apart for the benefit of my intended wife shall not be divided between my children . . . until (her) death. This portion of my said estate shall be governed by the intention in this my will heretofore expressed. It being my desire and intent that should L.M.K. become my wife she shall become entitled to one-third of the income from my said estate as long as she . . . does not remarry. From the date of her re-marriage she shall cease to be interested in my said estate and the entire income and corpus shall be governed by the intention in this my will heretofore expressed:"—

*Held*, that the widow was put to her election between the benefits under the will and her dower in the realty.

Discussion of the rule in *Parker v. Sowerby* (1854), 4 DeG.M. & G. 321, that it must appear from the will that the testator intended to dispose of his property in a manner inconsistent with his wife's right to dower; and the application of the rule.

The fact that the wife is given merely one-third of the net income from the whole blended fund for her life or during widowhood, rather than a share of the fund itself, does not take the case out of the rule.

The argument that the testator's estate in his own realty is less than a full estate in fee simple, because during his lifetime his wife had an inchoate right to dower, is fallacious.

*McGregor v. McGregor* (1873), 20 Gr. 450, and *Re De Olloqui* (1927), 32 O.W.N. 299, followed.

Although the widow failed in her contention, the question was such as to justify an originating motion for determination of the question, especially as the testator failed to declare expressly that the gift should be in lieu of dower; and therefore the costs of all parties should be paid out of the estate.

*Lays v. Toronto General Trusts Co.* (1892), 22 O.R. 603, distinguished.

APPLICATION by the executors and trustees under the will of George M. Hendry, deceased, for an order determining whether or not the widow of the deceased is put to her election as to her dower in the lands of the deceased; and, if entitled to dower, at what value encumbered lands are to be taken for the purpose of calculation.

April 8. The application was heard by ORDE, J.A., in the Weekly Court, Toronto.

G. W. Mason, K.C., for the executors and trustees.

W. F. Spence, for the widow of the testator.

*McGregor Young*, K.C., Official Guardian, for four infant children of the testator.

May 19. ORDE, J.A.:—The testator was a widower when he made his will on the 6th February, 1929. He then had four children, all of whom were then, and still are, infants. The will was made in contemplation of marriage, and the intended marriage took place shortly afterwards. The testator died on the 31st March, 1929, leaving the widow and the four children, already mentioned, surviving him.

After directing payment of his debts and funeral and testamentary expenses, the will devises and bequeaths his whole estate,

Orde, J.A. both real and personal, to his trustees in trust to convert the same  
1931. into money and to invest the proceeds in securities authorised by  
Re law for trust funds, and "to pay and apply the net income there-  
HENDRY from as follows:—

"To pay to my intended wife, Lillian May Kidney, should she become my wife, one-third of said net income in quarterly instalments so long as she may live and (or) not remarry."

The balance of the income is directed to be applied for the benefit of the children as to the trustees may seem best.

He then directs that the corpus of his estate shall be divided equally among his children who survive him, they to receive their respective shares upon attaining the age of 25 years. And there is a provision that as the children respectively receive their shares of the corpus they shall cease to participate in any income from the estate. Then follows this clause:—

"Provided that the portion of my said estate set apart for the benefit of my intended wife shall not be divided between my children as hereinbefore provided until the death of my said intended wife. This portion of my said estate shall be governed by the intention in this my will heretofore expressed. It being my desire and intention that should Lillian May Kidney become my wife she shall be entitled to one-third of the income from my said estate so long as she remains my widow and does not remarry. From the date of her re-marriage she shall cease to be interested in my said estate and the entire income and corpus shall be governed by the intention in this my will heretofore expressed."

The widow bases her case upon the judgment in *Leys v. Toronto General Trusts Co.* (1892), 22 O.R. 603. She says that the blending of the realty and personalty into a fund is for the purpose of providing for the payment of an income to her, as was the case there, and that she is therefore not bound to elect. But there is this marked distinction between the *Leys* case and this. There the widow was to get a fixed annual sum out of the income. That sum would not vary and could not be affected by the rise and fall of the revenues of the estate. Here the widow is to receive one-third of the whole net income from the blended fund, and it is

clear that the payments to her must depend upon the actual net revenue derived by the estate from time to time, and will vary with the variations in the net income.

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This distinction is sufficient, in my judgment, to render the *Leys* case inapplicable.

It is not necessary to discuss all the cases that were cited in the argument. I have read and considered all of them. The general principle is thus stated by Lord Cranworth in *Parker v. Sowerby* (1854), 4 DeG. M. & G. 321, at pp. 325-6: "The rule rather is, that it must appear from the will that the testator intended to dispose of his property in a manner inconsistent with the wife's right to dower."

That rule is not confined in its application to the devise to the wife of an interest in a specific parcel of realty, where it would be clearly inconsistent with the testator's intention that she should have not only the interest so devised but a life-estate in one-third of the parcel as well. It has been applied to cases where the will provides for the conversion of the whole estate, both real and personal, into a blended fund, and gives to the widow a share in the blended fund itself. Such cases were *McGregor v. McGregor* (1873), 20 Gr. 450; *Re Quimby*, *Quimby v. Quimby* (1884), 5 O.R. 738; *Amsden v. Kyle* (1884), 9 O.R. 439; and *Re De Olloqui* (1927), 32 O.W.N. 299.

In *Re Williamson* (1916), 11 O.W.N. 142, Middleton, J., pointed out that neither a direction to sell and realise nor the formation of a blended fund was a sufficient indication of the testator's intention to deprive the wife of her right to dower if she accepts the benefits given by the will, and he refers to the *Leys* case, *supra*, and to *Re Shunk* (1899), 31 O.R. 175, and *Re Hurst* (1905), 11 O.L.R. 6, in support of that statement. With that view I fully agree. There must be more than a mere direction to sell or to create a blended fund. The gift to the wife must be such in its character as to be inconsistent with her assertion of her dower-rights in the realty. And in determining whether or not the assertion of both claims is incompatible, the fact that it is out of a blended fund that the gift to the wife is made is of some importance.

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If the gift here were of some part of the corpus of the blended fund, the widow would clearly be put to her election under the authority of *Parker v. Sowerby*, *supra*, and of the four Ontario cases above mentioned which followed it. Does the fact that the wife is given merely one-third of the net income from the whole blended fund for her life or during widowhood, rather than a share of the fund itself, take the case out of the rule?

Having regard to the rule itself, I am of the opinion that it does not. The testator blends the whole of his realty and personalty into one fund. Of the total net revenue derived from the whole fund one-third is to go to his widow. How can it be possible to carry out that intention if, before the creation of the blended fund, the widow is to take one-third of the realty by metes and bounds for her life, or its equivalent value in money? If she is to be permitted to do that, then the gift intended for her by the testator to be derived from the whole of his estate cannot possibly be carried out to the full. To the extent that she has asserted her right to dower, the net income available for distribution by the trustees is correspondingly reduced. That she should derive the benefit of a life-estate in one-third of the realty, and at the same time receive one-third of the income from the remaining part of the realty and from the personalty, is clearly incompatible with the testator's direction that she should receive one-third of the income from all the realty and personalty combined. I should so hold on the principle to be deduced from the authorities already mentioned. In the *Leys* case the gift of a fixed sum per annum out of the income from the blended fund was not inconsistent with the assertion of her claim to dower. Unless the subtraction from the estate of her dower-rights so affected the earning power of what was left as to reduce the income below the amount of her annuity, there was no conflict between the establishment of her right to dower and the annuity given by the will.

I have been unable to find any Ontario case precisely in point, but in *Roberts v. Smith* (1823), 1 Sim. & Stu. 513, to which Chancellor Spragge refers with approval in *McGregor v. McGregor*, *supra*, the gift was a gift of income only out of what would appear to have been a blended trust fund of the whole of the testator's residuary realty and personalty. It is not quite clear from the

report whether or not the residuary realty was specifically described by parcels, but from the arguments of counsel I should assume that it was not. It was held that the equal division of the income from his property, intended by the testator, would be disappointed if the wife were to have her dower in the first place.

It is to be noted that in *Roberts v. Smith*, counsel for the widow argued that the devise to the trustees was only a devise of all the testator's right and interest, subject to the wife's dower, and therefore did not oust her of that right. The Vice-Chancellor does not refer to that argument, but he clearly does not give effect to it.

The contention of counsel in that case is almost invariably repeated in every case involving this question. There is, of course, some distinction in language between a specific devise of lot A., which in one sense is a gift of the land itself rather than of the testator's estate in it, and a general gift of all the estate, both real and personal, of the testator. But I can see no difference in the legal effect of the two gifts, as carrying in either case the realty covered by the language.

The argument that the testator's estate in his own realty is less than a full estate in fee simple, because during his lifetime his wife had an inchoate right to dower, is fallacious. Any interest or estate which she has in the land arises upon his death. A residuary devise of all his realty is just as full and complete a disposition of it under his will as if he had expressly and separately defined every parcel of realty comprised in it. It was so argued in this case. But this fallacious argument has been disposed of, either expressly or impliedly, by all the cases I have referred to. In *McGregor v. McGregor*, 20 Gr. 450, at p. 453, Chancellor Spragge disposed of the very point. He says, referring to Mr. Jarman's exception to certain English decisions: "He seems to me to push to an extreme length the doctrine that when a testator devises all his estate, he is to be taken to mean all his interest in the estate devised, leaving the right to dower in the wife intact; and he reasons from this, that where a testator directs all his estate real and personal to be equally divided, he is to be taken to mean his estate after satisfying his wife's dower; although the wife be one

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of those between whom this equal distribution is to take place. Such a construction appears to me to be a forced and unnatural one, and one that would almost certainly disappoint the intention of the testator." I dealt with the same argument in the same way in *Re De Olloqui*, 32 O.W.N. 299.

Mr. Young relied on the clause of the will which I have secondly quoted above as strengthening the argument against the widow's claim. I must confess that I do not know what the testator meant by the words "the portion of my estate set apart for the benefit of my intended wife." He makes no such direction, though as the children come of age some such setting apart might become necessary if there is to be a partial distribution of the corpus. I find it difficult to see how the clause mentioned affects the question of election one way or the other.

In my opinion the widow is put to her election between the benefits under the will and her dower in the realty.

The second question submitted by the notice of motion only required an answer if my judgment should be in favour of the widow.

Though the widow has failed in her contention, I think that the question was such as to justify the motion, especially as the testator failed to declare expressly that the gift should be in lieu of dower. The costs of all parties should be paid by the estate, those of the executors as between solicitor and client.

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May 20.  
July 23.

*Will—Construction—Devise to Trustee in Trust to Pay Income to Adopted Daughter during her Life and after her Death to Divide Corpus between her Children—Shares of Children Vested at Death of Testator—Postponement of Gift for Convenience of Estate.*

The testator, dying in January, 1904, left a will dated in September, 1899. After directing payment of his debts, etc., he devised to M. all his real estate in trust to pay the income thereof to his adopted daughter during her life, "and in the event of my selling the

said real estate during my life . . . M. as such trustee shall invest the purchase-money . . . and pay the interest therefrom to my said adopted daughter during her life and after (her) decease . . . the said real estate or the proceeds thereof shall be equally divided between (her) children." The adopted daughter, M.R., was living at the testator's death. She then had two children, J.R. born on the 24th December, 1899, and H. R. born on the 20th October, 1901. H.R. died on the 27th December, 1926, leaving a widow and two children, still infants. M.R. entered into possession of the real estate and occupied it until her death on the 12th October, 1928. She had no other children:—

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*Held*, that the gift to the children of M.R. came within the rule that where there is a gift of corpus to children as a class, and the gift is not immediately distributable, the property given vests in all the children in existence at the death of the testator, but so as to open and let in children subsequently coming into existence before the period of distribution.

In the events that happened, the interests vested in J.R. and H.R. at the testator's death were not disturbed.

The mere fact that the gift in remainder follows the life-interest of M.R. and is given after her decease does not bring the case within the rule applied in *Busch v. Eastern Trust Co.*, [1928] S.C.R. 479—the postponement of the gift until after the life-estate was merely for the convenience of the estate, and the estates of J.R. and H.R. were vested at the testator's death.

The *Busch* case explained.

J.R. and H.R., therefore, took a vested remainder in the real estate, as tenants in common, at the testator's death, subject only to the life-interest of their mother.

APPLICATION by James Reid for an order determining a question arising from the terms of the will of James Moore, deceased, as to the disposition of his estate.

April 8. The application was heard by ORDE, J.A., in the Weekly Court, Toronto.

*H. Morwick*, for James Reid.

*W. T. Henderson*, K.C., for the widow of Harold Reid.

*McGregor Young*, K.C., Official Guardian, for the infant children of Harold Reid.

Charles Morgan, named in the will of the testator to succeed William Sidney Morgan as executor, was served with notice but did not appear.

May 20. ORDE, J.A.:—James Moore died on the 28th January, 1904, leaving a will dated the 26th September, 1899. There was also a codicil which does not affect the question now raised.

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After directing payment of his debts, etc., he disposes of his realty in the following words:—

“I give and devise to William Morgan of Hamilton my friend all my real estate in trust to pay the income therefrom to my adopted daughter Martha Reid during her life and in the event of my selling the said real estate during my life the said William Morgan as such trustee shall invest the purchase-money in mortgages and pay the interest therefrom to my said adopted daughter during her life and after the decease of my said adopted daughter it is my will that the said real estate or the proceeds thereof shall be equally divided between the children of my said adopted daughter. I appoint the said William Morgan my executor and in the event of his decease before the decease of my said adopted daughter Charles Morgan son of William Morgan shall act as my executor and trustee.”

Martha Reid, the adopted daughter, was living at the testator's death. She had then two children, James Reid born on the 24th December, 1899, and Harold Reid born on the 20th October, 1901.

Harold Reid died on the 27th December, 1926, leaving his widow, Elsie Violet Reid, since married to one Peter Jones, and two children who are still infants.

Martha Reid entered into possession of the real estate and occupied the same until her death on the 12th October, 1928. She had no other children than the two already mentioned.

William Sidney Morgan proved the will as executor, but has since died. The date of his death is not stated. No further probate has been obtained either by his son Charles Morgan or by any one else. Charles Morgan has been served with notice of this application, but has not appeared. The questions raised by the motion do not, I think, necessitate the presence of an executor or administrator before the Court, as the death of Martha Reid has terminated any trusteeship of the realty.

The neat question raised is whether or not James and Harold, the two children of Martha, took vested estates at the testator's death as tenants in common in remainder, subject only to their mother's life-interest. If they did, then the death of Harold before the death of his mother would not affect his share, which would form part of his estate, and upon his mother's death would become an estate in possession in his heirs or devisees.

There is no gift over in the event of the death of any child of Martha's during her lifetime, either to the children of any such child by way of representation or otherwise by way of substitution.

It is a general rule of construction that a gift to the children of A. means *primâ facie* the children of A. in existence at the testator's death if any such children are then in existence: Hawkins on Wills, 3rd ed., p. 86. This rule is qualified if the children are so described as to indicate that after-born children are intended to be included.

But the rule gives way to another rule, that where there is a gift of corpus to children as a class and the gift is not immediate, i.e., is not immediately distributable, the gift vests in all the children in existence at the death of the testator, but so as to open and let in children subsequently coming into existence before the period of distribution: Hawkins, p. 91.

The gift to the children of Martha, in my opinion, clearly comes within this last mentioned rule. There is a life-interest in her which postpones the period of distribution until her death. Under the rule that an intervening life-interest does not postpone the period of vesting so far as any children alive at the testator's death were concerned, they acquired a vested interest "subject to be partially divested in favour of children subsequently coming into existence during the life of" Martha Reid: Hawkins, p. 91. No children were subsequently born to her, so that, in the events that happened, the interests vested in James and Harold at the testator's death were not disturbed.

It is strenuously argued, however, that under the language of the gift the vesting did not take place at the testator's death but at the period of distribution, that is at the death of the life-tenant, and that, as Harold Reid predeceased her, the whole estate in remainder goes to James Reid as her only surviving child.

In support of this argument counsel for James Reid relies upon the judgment of the Supreme Court of Canada in *Busch v. Eastern Trust Co.*, [1928] S.C.R. 479, and also upon *Re Waters* (1929), 36 O.W.N. 290; *Dodgson v. Dodgson* (1930-1), 37 O.W.N. 346, 39 O.W.N. 396; *Re Green* (1930), 38 O.W.N. 313; and *Re Drummond* (1930), 38 O.W.N. 109, 39 O.W.N. 216.

The *Busch* case is now continually cited in support of some contention which before would hardly have been raised, as if in

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some way it had effected a radical change in the law and had created some new principle governing the question of vesting. The judgment did no such thing. It applied a well known principle to the peculiar circumstances of that case. Whether or not the language of the will called for the application of the principle was not altogether clear, from the fact that four Judges in Nova Scotia had held for the respondents and one for the appellant, and the appellant succeeded in the Supreme Court in reversing the Court below.

The *Busch* case was an application of the principle referred to at p. 486 of [1928] S.C.R., and stated in Williams on Executors, 11th ed., p. 981, as there quoted, that where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected. The Supreme Court merely determined that upon the particular language of that will the principle applied and that the gift could only take effect at the period of distribution.

But the Supreme Court did not hold that the mere fact that in the collocation of the words of the gift a gift in remainder follows a gift of a life-estate, has the effect of making the gift in remainder contingent upon the donee's surviving the life-tenant. That would be to make a distinction between the case where the testator says, "I give my estate to A. for life and after his death to B.," and the case where he says, "I give my estate to A. for life, and after his death I give the said estate to B." It is true that in the latter case the words of the gift seem to be connected with the period of distribution when the estate given to B. becomes an estate in possession. But I have never understood that the law made any distinction between the two cases just put. In either case the words would give to B. an immediate vested interest in the estate in remainder.

That is based upon the principle that "even though there be no other gift than in the direction to pay or distribute *in futuro*; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. Thus, where a sum of stock

is bequeathed to A for life; and, after his decease, to trustees, upon trust to sell and pay and divide the proceeds to and between C and D, or to pay certain legacies thereout to C and D; as the payment or distribution is evidently deferred until the decease of A, for the purpose of giving precedence to his life-interest, the ulterior legatees take a vested interest at the decease of the testator." This original language of Mr. Jarman was entirely approved by Wigram, V.-C., in *Packham v. Gregory* (1845), 4 Hare 396, and has been followed in many cases—Jarman on Wills, 7th ed., pp. 1377-8.

The *Busch* case has been distinguished in several recent cases, namely, *Re Murray* (1930), 38 O.W.N. 187; *Re Roach* (1930), 38 O.W.N. 189, 39 O.W.N. 109 (it has now gone to the Supreme Court of Canada); and *Re Badgerow* (1930), 39 O.W.N. 14. And within the past few days in its judgment (not yet reported) in *Singer v. Singer* (styled below *Re Singer* (1930), 39 O.W.N. 278), the Supreme Court of Canada refused to apply the *Busch* case, pointing out, in effect, that it was the language of the will which governed its decision there.

I am clearly of the opinion that here the mere fact that the gift in remainder follows the life-interest of the life-tenant, and is given "after the decease of my said adopted daughter," does not bring the case within the rule applied in the *Busch* case, but that the postponement of the gift until after the life-estate was merely "for the convenience" of the estate, and that the estates of the two sons were vested at the testator's death, in accordance with the principle stated in Jarman, *supra*, at p. 1377.

The order will therefore declare that James Reid and Harold Reid took a vested remainder in the testator's realty as tenants in common at the testator's death, subject only to the life-interest of their mother.

I am asked also to make an order for the sale of the real estate, if Harold's children have any interest therein. It is stated that Harold died intestate, as above set forth. But it is not shewn that his intestacy has been established by letters of administration. In any case, as his vested interest now forms part of his estate, any sale of that interest ought to be made in the course of the administration of his estate, and not James Moore's. I do not therefore deal with that branch of this application.

The costs of all parties will be paid out of the estate.

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July 23. ORDE, J.A.:—Since the foregoing judgment, the Supreme Court of Canada has dealt with the *Roach* case in a judgment delivered on the 26th May, 1931. The *Busch* case is not referred to, but the judgment of the Court, pronounced by Mr. Justice Rinfret, refers to the passage in Theobald on Wills, 8th ed., at p. 656, which corresponds to those quoted above from Jarman at pp. 1377-8, and holds that while the decision was postponed the gift in remainder vested at once.

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[IN CHAMBERS.]

RE MCBRIDE AND STEWART.

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May 21.

*Costs—Recount of Ballots Cast at Municipal Election—Municipal Act, secs. 137, 138—Taxation of Costs by Deputy-clerk of County Court—Motion to Quash Certificate of Taxation — Officer Exceeding his Jurisdiction—Allowance of Sums in Excess of those Authorised by County Court Tariff—Sec. 138(2) Applicable to Amounts as well as Items—Authority of Deputy-clerk—Judicature Act, sec. 81—Interpretation Act, sec. 28(1).*

S. was returned as duly elected Mayor of the City of T. for 1931. The ballots cast at the election were, on the application of M., a candidate at the election, ordered to be recounted; the recount was proceeded with as provided for by the Municipal Act, R.S.O. 1927, ch. 233, sec. 137; and as a result S. was declared to have been duly elected, and M. was ordered by the Judge of the County Court who held the recount to pay S.'s costs thereof after taxation by the clerk of the County Court.

Section 138 of the Act provides (subsec. 1) that the costs of the recount shall be in the discretion of the Judge; and (subsec. 2) that the clerk of the County Court shall tax the costs and "shall, as nearly as may be, follow the tariff of costs of the County Court." The costs were taxed by the deputy of the clerk at \$1,067.50. No appeal from the taxation is provided for.

Upon the return of a *certiorari* the proceedings were brought into the Supreme Court, and M. moved to quash the certificate of taxation, upon the ground that the deputy-clerk exceeded his authority in allowing the amounts he did. The officer adopted the view that the statutory direction in subsec. 2 applied only to items, not amounts, and in fact allowed sums in excess of those authorised by the County Court tariff:—

*Held*, that in so doing he exceeded his jurisdiction and his certificate should be quashed.

It was argued that the clerk of the County Court was *persona designata*, and could not delegate his authority to tax:—

*Held*, having regard to sec. 81 of the Judicature Act, R.S.O. 1927, ch. 88, and sec. 28(1) of the Interpretation Act, R.S.O. 1927, ch. 1, that the deputy-clerk had power to tax the bill.

MOTION by Samuel McBride, upon the return of a *certiorari*, for an order quashing the certificate of the deputy-clerk of the County Court of the County of York, of the result of the taxation by him of the costs of William J. Stewart of and incidental to a recount of the ballots cast at the 1931 election of a Mayor of the City of Toronto.

The motion was heard by JEFFREY, J., in Chambers.

S. A. Hayden, for Samuel McBride.

G. T. Walsh, K.C., for William J. Stewart.

May 21. JEFFREY, J.:—The election for Mayor of the City of Toronto, held on the first day of January, 1931, resulted in the return of William J. Stewart as Mayor.

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The applicant herein, Samuel J. McBride, who was a candidate, applied to his Honour Judge O'Connell, a Judge of the County Court of the County of York, for and was granted an order directing that the ballots cast at the said election be recounted. The recount was proceeded with as provided for by the Municipal Act, R.S.O. 1927, ch. 233, sec. 137, and amending Acts, and as a result the said William J. Stewart was declared duly elected Mayor of the City of Toronto.

The costs of the said Stewart of the said recount were ordered to be paid by the said Samuel McBride forthwith after taxation thereof by the clerk of the County Court of the County of York. These costs were duly taxed and allowed at the sum of \$1,067.50, the bill thereof being made up as follows:—

Taxed 76 Having been served with appointment for re-count.	
\$75 Preparation for same .....	\$100.00
Counsel fee Nathan Phillips, K.C., before his Honour Judge O'Connell on 12, 13, 14, 15, 16, 17, 19 and 20 January, 1931, \$150.00	
\$637.50 a day—7½ days .....	1,200.00
Solicitor fee before his Honour Judge O'Connell, on 12, 13, 14, 15, 16, 17, 19 and 20 January, @ \$100 a day .....	800.00
Agent engaged 8 days in tallying votes at \$15.00 a day .....	120.00
120.00 Stenographer's fees . . . . .	120.00
	<hr/>
	\$2,340.00
	76 1,172.50
	<hr/>
	\$1,067.50

Section 138 of the Municipal Act, subsec. 1, provides that the costs of the recount shall be in the discretion of the Judge, who may order by whom, to whom, and in what manner they shall be paid; and (subsec. 2) "The clerk of the county . . . court shall tax the costs and shall, *as nearly as may be, follow the tariff of costs of the county court.*"

No appeal from the taxation is provided for.

The applicant McBride, dissatisfied with the various amounts allowed by the deputy-clerk, applied for *certiorari*, and an order for the same was granted by the Chief Justice of the High Court, dated the 23rd day of March, 1931; leave to appeal therefrom was refused by Garrow, J.; and the matter is now before me to say whether or not the said deputy-clerk exceeded his authority in allowing the amounts he did on the taxation.

Referring again to subsec. 2 of sec. 138 of the Municipal Act, "The clerk of the county . . . court shall tax the costs and shall, as nearly as may be, follow the tariff of costs of the county court." This subsection was drawn to the attention of the deputy-clerk, and his reply was: "I am going to find that the basis on which the bill is to be taxed should be according to items and not amounts." He allowed a counsel fee of \$75 a day; a solicitor's fee of \$50 a day for 8 days; agent engaged 8 days—\$10 a day. Now all these items are to be found in the tariff of costs of the Supreme Court, excepting the last, which is not provided in either County or Supreme Court tariff. It is a fact that all items which are to be found in the tariff of costs of the Supreme Court applicable to recounts of this nature are also to be found in the County Court tariff of costs. That being so, the deputy-clerk's interpretation of the section deprives the words "shall, as nearly as may be, follow the tariff of costs of the county court," of all meaning, and the words "the tariff of costs of the Supreme Court" might just as well have been used.

I am of opinion that the deputy-clerk misdirected himself in so interpreting the section before referred to, and he could not, when the items in the bill taxed were to be found in the County Court tariff, allow any greater amount than provided for in that tariff. This clearly he did not do. No greater amount than \$70 can be allowed under the County Court tariff, no matter how long the trial may last, yet he allowed \$75 a day for  $7\frac{1}{2}$  days. Again, he has allowed a solicitor's fee of \$50 a day for the period of 8 days; the tariff provides for a fee of \$15 for the trial. In respect to these two items he has exceeded his authority.

I am not quite so clear as to the third item—"agent employed 8 days in tallying votes." For these services he allowed \$80. There is nothing before me to shew that the attendance of such an agent was necessary; that the services he rendered facilitated the recount proceedings. If such agent was present at the direc-

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Jeffrey, J. 1931. RE MCBRIDE AND STEWART. tion of the presiding Judge, who deemed it proper that he should be present in order that the proceedings should be more readily proceeded with, then, having regard again to the words of subsec. 2, the clerk of the County Court shall, as nearly as may be, follow the tariff of costs of the County Court, and remembering that the said item is not covered by the tariff, I am not prepared to say that in a proper case the taxing officer would be exceeding his authority in making a reasonable allowance. The allowance made is generous, and in my opinion should not be increased. I leave this item open for the further consideration of the taxing officer.

On the argument before me, Mr. Walsh, counsel for Mr. Stewart, stated that in his opinion the taxing officer could allow such sum as he saw fit by way of counsel fee—\$200 or \$300 a day, or a greater amount, if he deemed it proper, restricted in no way by either the Supreme or County Court tariff of costs—he adopting the view of the taxing officer that the statutory direction applied only to items, not amounts. This contention I cannot agree with. An applicant on recount proceedings, ordered to pay costs, would be at the mercy of a taxing master from whom there is no appeal; and if he, the taxing master, had the unfettered discretion contended for, then it might be that no relief would be available from his findings, no matter how extravagant they were. I quite agree that, if my conclusions as to the powers of the taxing master are to prevail, in some recount proceedings the fees or allowances which he is empowered to fix may be totally inadequate, but I am also of opinion that it was never the intention of the Legislature that the right to a recount should be practically denied by reason of the costs of the same: hence the words “and shall, as nearly as may be, follow the tariff of costs of the County Court.”

It is further to be noticed that, under sec. 137 of the Municipal Act, the amount of the security required to be deposited for costs in connection with the recount is \$25—an amount pitifully small if the taxing officer has all the authority contended for.

Subsection 2 of sec. 138 of the Municipal Act provides for the taxation of costs by the clerk of the County Court. The costs of the recount were taxed by his deputy, A. J. Skeans, who was appointed under the provisions of sec. 81 of the Judicature Act.

It was argued that the clerk of the County Court was *persona designata*, and that he could not delegate his authority to tax.

Section 81 of the Judicature Act was relied on as giving authority to the deputy of the County Court clerk. This section reads as follows:—

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“With the approval of the Lieutenant-Governor in Council, every local officer of the Supreme Court, county court clerk, and Surrogate Registrar, may, by writing under his hand and seal of office, appoint a deputy who may perform all the duties required to be performed by the officer making the appointment.”

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There may be some doubt whether this section enabled the County Court clerk to delegate his authority, but I am of opinion that his deputy had authority to tax the bill of costs herein, if I correctly interpret the language of sec. 28(1) of the Interpretation Act.

“28. In every Act, unless the contrary intention appears, . . . . (1) “words directing or empowering a public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, shall include his successors in such office and his or their lawful deputy.”

Applying this section, I am therefore of opinion that the deputy-clerk had power to tax the aforesaid bill.

Judgment quashing the certificate of taxation and referring the bill of costs back for taxation.

Costs of and incidental to the proceedings to be paid by W. J. Stewart.

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[ORDE, J.A.]

RE UPPER CANADA ESTATES LTD. AND MACNICOL.

1931.

*Municipal Corporations—Permit for Erection of Business Buildings in Certain Area of Village—Refusal of—Motion for Mandamus—By-law Passed by Council while Motion Pending Restricting Area to Residential Buildings—Municipal Act, sec. 406(8)—Motion Dismissed as to Lands within Restricted Area—Paramount Right Exercised in Interest of Public at Large.*

May 23.

The applicants prepared plans for the erection of certain buildings—stores, a bank building, and apartments therewith—upon certain lands in the village of F., presented them, along with specifications and other necessary material, to the commissioner of works for the village, and asked for a permit to proceed with the work. The commissioner refused to grant the permit, on the ground that the village council was considering a scheme, which might or might not develop, and that he did not think the council would issue the permit. On the same day, the 30th March, 1931, the applicants served

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upon the commissioner and the clerk of the municipality notice of a motion to be made on the 8th April for a mandamus requiring the commissioner and the municipality to issue the permit. On the 7th April the council passed a by-law declaring a certain described area in the village to be a "residential street." Part of the lands upon which the applicants desired to build lay within the limits so defined. The power to pass such a by-law is conferred by sec. 406, subsec. 8, of the Municipal Act, R.S.O. 1927, ch. 233, and by sec. 416 extended to villages:—

*Held*, that the mere deposit of the plans and the making of the application for a permit under the then existing building by-law, while constituting a *primâ facie* right to have the plans approved, was not enough to prevent the council from exercising its statutory power to pass a by-law to prevent the erection of buildings of the character proposed, within a defined area.

*Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81 (which overrules *Cridland v. City of Toronto* (1920), 48 O.L.R. 266), applied and followed.

The statutory power conferred upon the council of the municipality to pass a by-law regulating the character of buildings in any defined area in the interest of the public at large is intended to be paramount to the *primâ facie* rights of the individual, and the question of their respective rights does not fall to be dealt with as of the date of the application and deposit of plans but as of the date when the question comes before the Court for its adjudication.

As to so much of the land as lay within the prescribed area the application was dismissed, but as to the lands outside that area the mandamus was granted.

AN application by Upper Canada Estates Ltd. and A. C. Jennings for a mandamus requiring the respondent N. MacNicol, the commissioner of works for the Corporation of the Village of Forest Hill, and the corporation itself, respondents, to issue a permit to the applicants for the erection of certain buildings, stores, a bank building, and apartments therewith, on certain lands owned by Upper Canada Estates Ltd., abutting on Eglinton-avenue, in the village.

April 8 and May 9. The application was heard by ORDE, J.A., in the Weekly Court, Toronto.

*F. G. McBrien*, for the applicants.

*Melville Grant*, for the respondents.

May 23. ORDE, J.A.:—Owing to an error in the reference to the sections of the Municipal Act under which the by-law in question was passed, the judgment noted in 40 O.W.N. 154 has been recalled and the following is substituted for it:—

From the material before me it appears that some time ago the applicants approached the officials of the municipality with a view to the erection of certain buildings within the village. They were then told that the village council had in view a plan for the

development of the northern part of the village, and that any application of the nature then proposed would have to go before the council.

Later, the applicants prepared the plans now in question, and on the 30th March, 1931, they were presented to the respondent MacNicol as the commissioner of works for the village, along with specifications and such other material as the then by-law required for the purpose of obtaining the necessary permit to proceed with the work. The commissioner refused to grant the permit, on the ground that the council was considering a scheme, which might or might not develop, and that he did not think the council would issue the permit.

On the same day the applicants launched this motion and served notice thereof upon the respondent MacNicol and the clerk of the municipality.

By some error the notice included a parcel of land which was not intended to be included, and an amended notice was served on the 7th April, 1931. The motion was returnable on the 8th April, 1931, and was first heard by me on that day.

In the meantime, the council of the municipality, on the 7th April, 1931, passed a by-law, No. 531, which, after reciting that it was deemed advisable to make a portion of Eglinton-avenue a residential street, enacted that both sides of Eglinton-avenue, from its intersection by the railway known as the Belt Line west-erly to a point 200 feet easterly from its intersection by the east-erly line of Bathurst-street, be "declared to be a residential street." It also fixed a frontage line for buildings on Eglinton-avenue.

Part of the lands in question lies within the limits so defined.

The power to pass the by-law is conferred upon the council of the municipality by sec. 406, subsec. 8, of the Municipal Act, R.S.O. 1927, ch. 233. That subsection is, by sec. 416, extended to villages.

The applicants rely upon *Cridland v. City of Toronto* (1920), 48 O.L.R. 266, for their contention that when they made the application they were entitled by law to a permit, and that the passage of a by-law before the hearing of this motion for the mandamus cannot destroy their right. There is this to be observed about the *Cridland* case, that the amendment made by the city council to the existing building by-law with a view to thwarting the applicant's application, while general in its character, enabled the municipal

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authorities to discriminate between individual applicants. It did not declare any street or area residential.

But the decision does hold, as I read it, that a municipality cannot "compel a landowner to refrain from the exercise of his rights under the law as it is to-day, so as to enable the . . . . council to consider the enactment of a law which will make that unlawful which is to-day lawful" (p. 267).

But, since the *Cridland* case, a cognate case has had a ruling by the Judicial Committee of the Privy Council, which I think in effect overrules it. It is true that in *Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81, the by-law in question came under those provisions of sec. 399a. of the then Municipal Act which are now embodied in sec. 398 of the present Act, and required approval by the Ontario Railway and Municipal Board before becoming effective.

But the reasoning of the Privy Council judgment is just as applicable to a by-law so passed as to be fully effective under subsec. 8 of sec. 406, as to one passed under sec. 398. It is quite clear, from the reasoning at pp. 86-7, that the mere deposit of the plans and the making of the application for a permit under the then existing building by-law, while constituting a *primâ facie* right to have the plans approved, was not enough to prevent the council from exercising its statutory power to pass a by-law to prevent the erection of buildings of the character proposed, within a defined area.

In the passage of Lord Cave's judgment to which I have referred he criticises the reasoning of the judgment of the majority in the Supreme Court of Canada, and points out that, if the "status" of the building owner is to prevail, as was held in the Courts below, it must prevail "whether he has or has not deposited plans with a view to building upon his land." And at p. 87 he says, "There may be a *primâ facie* right to have the deposited plans approved; but if so, that right is negated by the passing and approval of the by-law."

It is argued that the Judicial Committee was then considering the effect of para. (a) of subsec. 2 of sec. 399a. (now sec. 398), which exempts from the operation of the by-law any land or buildings already used or erected on the day the by-law is passed for any purpose prohibited by the by-law, and that their reasoning must be strictly confined to the operation of that section. But I

do not so read the judgment. What was in issue there was the simple question whether or not, after the making of the application for a permit and the depositing of the plans at a time when the school board had a *primâ facie* right to use the lands for the proposed purpose, the city council could, by subsequently passing and getting the approval of a by-law under its statutory powers, defeat that *primâ facie* right. The right to use certain parts of the land and buildings for school purposes was recognised by the judgment of the Appellate Division, *Re Toronto Roman Catholic Separate School Board and Price* (1923), 54 O.L.R. 224, but the by-law was upheld as effectively preventing the issue of a permit for the erection of a school on the unused portion of the lands. And it was the Supreme Court's reversal of this last mentioned ruling that was dealt with by the Privy Council.

If the making of the application and the deposit of the plans are sufficient to give the applicants an unassailable right to the issue of a permit, then the conclusions of the Judicial Committee are unintelligible. I think it is plain from that judgment that the statutory power conferred upon the council of the municipality to pass a by-law regulating the character of buildings in any defined area in the interest of the public at large is intended to be paramount to the *primâ facie* rights of the individual, and that the question of their respective rights does not fall to be dealt with as of the date of the application and deposit of plans but as of the date when the question comes before the Court for its adjudication.

The race would seem to be to the swift in these matters, and the goal is not reached merely when the application for the permit is made, or even when the proceedings for a mandamus are launched, but only when the matter comes to be dealt with by the Court. So that the passing of an effective by-law by the council before the Court has adjudicated has the effect, as I understand the judgment of the Judicial Committee, of defeating the applicant in the exercise of what but for the by-law, would be his right to erect upon his land such buildings as the law had then permitted.

The case of *Re Hartley and City of Toronto* (1925), 56 O.L.R. 433, was cited, but it has no application here. It involved the question whether or not the applicants had commenced to use the lands and buildings for their purposes before the passage of the by-law. That is not the question here.

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Counsel for the applicants argued that there was a distinction between by-laws passed under sec. 398 and those passed under subsec. 8 of sec. 406, because the persons affected had an opportunity to be heard by the Ontario Railway and Municipal Board in the one case and not in the other. This is true, but I do not see what bearing the distinction has upon the point in question here. By-laws passed under subsec. 8 of sec. 406 require a two-thirds vote of the whole council, and it may be that the Legislature considered that requirement sufficient to safeguard the rights of any minority.

As to so much of the land as lies within the prescribed area the application must be dismissed. As to such lands as are outside the prescribed area the applicants are entitled to the mandamus.

In the circumstances there will be no order as to costs.

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*Company — Winding-up under Dominion Winding-up Act — Claim of Crown for Breach of Contract by Company — Priority over Claims of City Corporation and Electric Commissioners for Taxes and Power Supplied — Prerogative of Crown — Creditors of Equal Degree — Taxes, whether Expenses under Winding-up Act — No Beneficial Occupation by Liquidator.*

In an action against the liquidator of an incorporated shipbuilding company in liquidation under the Dominion Winding-up Act, it was held, that the Crown, in the right of the Dominion Government, had priority, in respect of its claim for unliquidated damages for breach by the shipbuilding company of a contract for the building of ships, over the claims of a city corporation and electric commissioners (the plaintiffs) for taxes and for the price of power supplied.

The Crown has never given up its prerogative right to priority for debts of every nature due to it as against creditors of equal degree, except under the provisions of the Bankruptcy Act, and then only to the extent therein declared.

The plaintiffs are creditors of equal degree with the Crown, their claims being for ordinary, simple debts.

As to certain taxes claimed, it was alleged that they were expenses under the Winding-up Act; but it was held, that, no evidence having been given as to any profitable use or beneficial occupation of the property by the liquidator, there was no right to these taxes superior to the right of the Dominion by reason of its prerogative.

*In re Oak Pitts Colliery Co.* (1882), 21 Ch. D. 322, and *In re Watson Kipling & Co.* (1883), 23 Ch. D. 500, applied.

IN this action the statement of claim was as follows:—

1. The plaintiff the Corporation of the City of Toronto is a municipal corporation, and the plaintiffs the Toronto Electric Commissioners are a body corporate within the meaning of the Public Utilities Act.

2. The defendant is an assignee and accountant, carrying on business in the city of Toronto, and by order of the Court dated the 3rd August, 1920, the defendant was appointed liquidator of the Dominion Shipbuilding and Repair Company Ltd., a company which carried on business within the city of Toronto, and which made an authorised assignment on or about the 31st July, 1920.

3. The plaintiff municipality filed with the defendant as liquidator a claim for \$35,076.55 for taxes owing by the said company, and claimed to be a secured creditor by virtue of the provisions of the Assessment Act.

4. The plaintiffs the Toronto Electric Commissioners filed with the defendant, as liquidator, a claim for \$1,594.06 for electrical power supplied to the said company, and claimed to be a preferred creditor by virtue of the Public Utilities Act.

5. The Department of Marine and Fisheries of the Dominion Government also filed a claim with the said liquidator for the sum of \$701,071.17 for unliquidated damages for failure to complete certain steamships according to a contract with the Canadian Mercantile Marine, and the said Department claimed payment of the amount due to it in priority to all other claims against the estate as a debt due the Crown in the right of the Dominion Government.

6. On or about the 26th May, 1926, the plaintiffs were advised that, unless some of the preferred creditors decided to litigate the question of the priority of the claim of the said Department, the estate would be wound up and the balance thereof would be paid to the Dominion Government.

7. The solicitor for the plaintiffs advised the defendant that the claim of the said Department should be proved in accordance with the provisions of the Winding-up Act.

8. Without complying with the provisions of the said Act and without further notice to the plaintiffs, the said defendant paid the balance of the estate, amounting to about \$40,000, to the Dominion Government, but made such payment subject to the con-

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dition that the said amount would be returned to the defendant if it were established subsequently that the said amount should not have been so paid.

9. From the date of the said assignment, the 31st July, 1920, until the 30th April, 1922, the defendant, as liquidator, was in possession of the premises of the company and carried on the business thereof, with the exception of a period from the 1st December, 1920, to the 31st August, 1921, when the Dominion Government was in possession.

10. The said Government paid the taxes to the plaintiff municipality for the period during which it was in possession, but the taxes and rates for the period after the assignment during which the defendant, as liquidator, was in possession, have not been paid, and the plaintiffs claim that the rates and taxes due to them for the said period should have been paid in priority to all other claims against the estate, including the liquidator's fees and expenses.

11. The plaintiffs claim that the defendant, in administering the estate of the Dominion Shipbuilding and Repair Company Ltd., did not comply with the provisions of the Dominion Wind-up Act.

12. The plaintiffs further claim a declaration that the amounts which became due and owing to them prior to the date of the said assignment for rates and taxes should have been paid in priority to the claim of the Dominion Government.

13. The amount due and owing by the assignor to the plaintiffs the Toronto Electric Commissioners for rates for supplying electrical power to the date of the said assignment is \$1,345.85, and the amount due and owing for such rates subsequent to the said date is \$248.21, making a total amount claimed by the said plaintiffs of \$1,594.06.

14. The plaintiff municipality imposed a penalty of 5 per centum for non-payment of taxes in each of the years from 1920 to 1922 inclusive.

15. The amount due to the plaintiff municipality at the date of the assignment for land taxes for the year 1920 is \$14,136.75 plus the said penalty of 5 per cent. or \$647.93, making a total of \$14,784.68.

16. The amount due to the plaintiff municipality for land

taxes and for the said penalty of 5 per cent. of \$647.93 make a total of \$14,784.68.

16. The amount due to the plaintiff municipality for land taxes and for the said penalty thereon for the period after the assignment, when the defendant, as liquidator, was in possession of the premises, is \$12,922.70, but this amount includes \$4,947.86 of the amount claimed in para. 15 hereof for the period from the 1st August to the 30th November, 1920.

17. The amount due to the plaintiff municipality for business taxes and the said penalty thereon for the period after the assignment when the defendant, as liquidator, was in possession of the premises, is \$5,042.70.

18. The plaintiff municipality further claims interest from the 1st May in each year following the year in which the taxes were levied until paid, at the rate of six per centum per annum, and the amount of such interest on the land and business taxes claimed herein until the date of the issue of the writ of summons is \$14,381.36.

19. The plaintiffs therefore claim—

(a) A declaration that the amount of land taxes and rates due prior to the date of the assignment should have been paid in priority to the claim of the Dominion Government.

(b) A declaration that the rates and taxes which became due and owing since the date of the said assignment should have been paid in priority to all other claims.

20. The plaintiff municipality claims from the defendant:—

(a) 1920 land taxes .....	\$14,784.68
1921 and 1922 land taxes .....	7,974.84
1920 and 1921 business taxes .....	5,042.70
Interest . . . . .	14,381.36

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Judgment for .....\$42,183.58

(b) Further and other relief.

(c) Its costs of this action.

The statement of defence was as follows:—

1. The defendant admits the allegations in paras. 1, 2, 3, 4, and 5 of the statement of claim, and, except as hereinafter expressly admitted, the defendant denies all the other allegations in the said statement of claim contained, and puts the plaintiffs to the proof thereof.

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2. The defendant did not dispute the claim of the Dominion Government for damages amounting to \$701,071.17, and the plaintiffs in this action were well aware that the said claim was not disputed, but took no steps to contest the same or to call upon the liquidator to do so, as they might have done under the statute in that behalf.

3. The defendant says that the Crown, in the right of the Dominion of Canada, has never given up its prerogative right to priority for debts due to the Crown, except under the provisions of the Bankruptcy Act, and that the liquidator of the Dominion Shipbuilding and Repair Company Ltd., which was being wound up under the Dominion Winding-up Act, had no alternative but to admit the right of the Dominion to such priority unless the application hereinafter referred to, or some application to wind up the company under the Bankruptcy Act, instead of under the Dominion Winding-up Act, had been granted.

4. The defendant alleges that certain ordinary creditors of the Dominion Shipbuilding and Repair Company Ltd., namely, the James Morrison Brass Manufacturing Company Ltd., took steps to set aside the order for the winding-up of the Dominion Shipbuilding and Repair Company Ltd., under the Dominion Winding-up Act, and to have the proceedings transferred to the Bankruptcy Court, and to have the Bankruptcy Act made applicable to the said company, but the said application was dismissed, the judgment being based, in part, on the fact that, in view of the large amount of the preferred claims and the comparatively small amount of the assets, the applicants and other ordinary creditors had no real or substantial interest in the question as to whether or not the Dominion Government had precedence over the other preferred creditors, as in any event there would be nothing for the ordinary creditors.

5. The plaintiffs in this action were notified of these proceedings, and were advised by the liquidator's solicitors, as were all the other preferred creditors under date of the 26th May, 1926, as to the position of the Dominion Government's claim, as to the position of the claims of the other preferred creditors, including the city's, and as to the result of the application of the James Morrison Brass Manufacturing Company Ltd., and, after communicating this information, the letter proceeded as follows:—

"The liquidator, therefore, deems it his duty to bring this situation to the attention of the preferred creditors, in case any one of them should desire to endeavour to get the liquidation transferred to the Bankruptcy Act, or should desire, even under the Dominion Winding-up Act, to litigate the question with the Dominion Government as to their priorities. Unless some preferred creditors decide to intervene in this way, or are prepared to finance the litigation, the liquidator proposes to go ahead and close up this estate, and in the event of his so doing there will be nothing for anybody but the Dominion Government as matters stand at present."

But the preferred creditors were all unwilling to intervene in connection with the said application or to avail themselves of the liquidator's suggestion that they might otherwise contest the claim of the Dominion Government under the Dominion Winding-up Act.

6. The liquidator, after repeated applications to the various preferred creditors, but not until the month of October, 1927, paid over to the Dominion Government the balance remaining in the liquidator's hands, and subsequently, but not until the 9th November, 1928, the liquidator, having shewn that the estate had been fully administered, obtained an order from the Court discharging him from his office as liquidator and from all further liability as such liquidator, and authorising the bond given by him as liquidator for the due performance of his duties as such to be delivered up so that the same might be cancelled and discharged.

7. During all the said period from the 26th May, 1926, to the 9th November, 1928, and thereafter until the issue of the writ in this action, on the 8th March, 1929, the plaintiffs in this action took no steps whatever to establish their alleged rights, or to contest the rights of the Crown, nor did they request the liquidator to do so, either with or without indemnity.

8. In reply to those paragraphs of the statement of claim in this action setting up a lien or right of priority in respect of the taxes on the lands of the insolvent company, the defendant says that the insolvent company had no lands, that the premises occupied by the insolvent company were leasehold property and that the defendant abandoned the lease. The defendant further says that in any event there was no distress made upon the goods or

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property of the insolvent company on behalf of the City of Toronto or on behalf of the Toronto Electric Commissioners or otherwise, and that there is no lien or prior claim in respect of any of the taxes or charges referred to in the said statement of claim.

9. The defendant therefore claims that this action should be dismissed with costs on the grounds:—

1. That the Crown, in the right of the Dominion of Canada, was properly entitled to priority over all other claims against the estate of the Dominion Shipbuilding Company Ltd., and that the liquidator was right in paying over the balance in his hands to the Crown.

2. That, in any event, it is now too late for the plaintiffs in this action to bring forward their present contentions, and that their claim ought to be dismissed by reason of their laches, neglect and delay, in bringing the same forward, and that the plaintiffs are estopped to set up their claim in this action.

3. That the plaintiffs are not and never were entitled to any preferential lien or claim upon the assets in the hands of the liquidator in this case.

May 27. The action was tried before LOGIE, J., without a jury, at a Toronto sittings.

*J. P. Kent*, for the plaintiffs. The claim of the commissioners is for power delivered up to the date of the liquidation, no part of it is for power used after the liquidation had begun. The 1920 taxes claimed by the city corporation are land taxes and are also a claim against the estate of the company in liquidation. These two are secured claims. There was a lien on the buildings and assets of the shipbuilding company at the time those assets came into the hands of the liquidator; and it is because of that lien and those secured claims that the plaintiffs have priority over the Dominion Government's claim. [LOGIE, J.:—You claim a lien by virtue of Ontario legislation?] Yes. The other part of the claim, speaking generally, is for taxes in 1921 and 1922, after the liquidation began and during the time the liquidator was in possession of the property and up to the time that he abandoned the lease. The taxes assessed during that period are prior to the claim of the Dominion Government. The commissioners' lien is secured by sec. 27 of the Public Utilities Act, R.S.O. 1914, ch. 204, providing a lien for the power. Once power is delivered a lien is

secured to the commissioners, and the assets which the liquidator obtains are charged with that lien, and the Dominion Government's claim is a royal prerogative, but subject to the lien. References to *City of Welland v. Electric Steel and Metals Co. Ltd.* (1924), 60 O.L.R. 127; *Re McKittrick Properties Ltd.* (1927), 60 O.L.R. 132. Then the city's claim for a lien, so far as buildings are concerned, is based on sec. 97 of the Assessment Act, R.S.O. 1927, ch. 238. See the definition of land in sec. 1 (h) of the same Act. The shipbuilding company was lessee of the land, but it owned the buildings, and there was a lien on them. There is a lien against every person except the Crown, and "Crown" means the Crown in right of the Province: *Gauthier v. The King* (1918), 56 Can. S.C.R. 176. Reference also to *Re International Metal Works Ltd.* (1924), 27 O.W.N. 331, a bankruptcy case. [LOGIE, J.:—Will bankruptcy cases help you? I understand that the winding-up was never under the Bankruptcy Act, but always under the Winding-up Act.] The company first of all went into bankruptcy. There was an order in bankruptcy on the 31st July, 1920, and on the 3rd August, 1920, the proceedings were transferred to the tribunal under the Winding-up Act. The bankruptcy cases shew that there was a lien on the property. [*A. C. McMaster, K.C.*, for the defendant, respondent. I am not sure that there was a bankruptcy order. There was an assignment to the trustee.] There was a motion made by some of the creditors: *Re Dominion Shipbuilding and Repair Co. Ltd.* (1926), 59 O.L.R. 89, and an order made by Fisher, J. [LOGIE, J.:—That was reversed or overruled by the Appellate Division.] Nothing serious turns on it. Our lien is there whether it was originally under the Bankruptcy Act or the Winding-up Act. I quoted the case merely to shew that the lien was established. [LOGIE, J.:—There is no doubt about it in bankruptcy, because the Dominion Government has by the Bankruptcy Act waived its prerogative so far as the taxes are concerned. Is not the whole point here whether under the Winding-up Act the prerogative has been waived?] There never has been a prerogative of the Crown against secured creditors. The Crown has a prerogative against creditors of equal degree, but not against creditors who have secured claims. I am citing a case to establish that there was such a lien: *In re Horton* (1923), 4 C.B.R. 273. We also had a claim on this estate for business taxes for 1920, the year in which the company went into

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liquidation. We are not claiming those taxes in this action. Business taxes are in a different position from land taxes, and we admit that we have not priority over the Crown so far as business taxes are concerned, because a lien for business taxes was not preferred until we made a seizure for business taxes in 1920: *Fuches v. Hamilton Tribune Co.* (1884), 10 P.R. 409. I refer also to sec. 112, subsec. 11, of the present Assessment Act. In this particular case there were still goods liable to seizure for taxes on the property which became attached, by virtue of notice being given of the amount due. In R.S.O. 1914, ch. 195, it is sec. 109, subsec. 6. However, our lien, so far as land taxes for 1920 are concerned depends upon sec. 97 of the present Assessment Act. Upon the question of the Crown's prerogative, I refer to Masten & Fraser's Company Law, 3rd ed., p. 1103, explaining the history of it, and the cases there cited, in all of which it is shewn that the priority is only as to unsecured creditors. [LOGIE, J.:—That is so under the Bankruptcy Act, but under the Winding-up Act I do not know.] I refer to *Re Imperial Paper Mills of Canada Ltd.* (1915), 7 O.W.N. 630, 633. The whole of the Crown's prerogative is set out in *Commissioners of Taxation for New South Wales v. Palmer*, [1907] A.C. 179—it exists only so far as there are creditors of equal degree. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails (p. 184). Then, under sec. 71 of the Winding-up Act, in the case of any claim of this kind the Court must determine the value and the amount for which it shall rank. Reference also to *Re Fashion Shop Co.* (1915), 33 O.L.R. 253; *Lazier v. Henderson* (1898), 29 O.R. 673, 679; *Tew v. Toronto Savings and Loan Co.* (1898), 30 O.R. 76; *Food Controller v. Cork*, [1923] A.C. 647; *Re D. Moore Co. Ltd.* (1927), 61 O.L.R. 434; *Re Toronto Metal and Waste Co.* (1921), 51 O.L.R. 287; Palmer's Company Precedents, 13th ed., Part 2, p. 495. As to the claim for the 1921 and 1922 taxes, imposed after the liquidation, I refer to secs. 93 and 94 of the Winding-up Act. It is on the basis of these two sections that our claim to priority over the Dominion Government's claim is based. [LOGIE, J.:—It all comes down to the question whether the lien given by the Ontario legislation constitutes the municipality a secured creditor.] That question arises only so far as the 1920 taxes are concerned and the claim of the commis-

sioners. The 1921 and 1922 taxes are not properly claims against the estate at all—they are expenses in connection with the liquidation. The liquidator found it necessary to hold possession of the property and to remain a lessee of it from the 31st July, 1920, to the 30th April, 1922. He gave up his lease on the latter date, and in that time he had arrears of taxes levied against him. The company is in the same position as the liquidator, under secs. 93 and 94 of the Winding-up Act. Reference to *In re National Arms and Ammunition Co.* (1885), 28 Ch. D. 474; *In re Ideal House Furnishers and City of Winnipeg* (1909), 18 Man. 650; *Re Bishop Construction Co. Ltd.* (1914), 15 D.L.R. 911; sec. 70 of the Assessment Act, R.S.O. 1914, ch. 195; and secs. 71, 74, 75, 76, and 85 of the Winding-up Act, R.S.C. 1927, ch. 213. The notice that was given in May, 1926, by the solicitor for the liquidator, was really a communication as to what further action should be taken. We said we would ask the liquidator to proceed under the Winding-up Act, and it was his duty to proceed to establish the priorities between the city and the Dominion Government, and not the duty of the city to make any application to establish its rank or to undertake to pay the costs of the liquidator. It is unusual for a matter to be wound up by the Court on an undertaking given by a creditor to indemnify in case of any further action against the liquidator. It leaves the winding-up proceedings wide open. Any creditor can come in at any time, and if a creditor establishes his claim the Government will return the money. The matter is not wound up but is still current, and the plaintiffs' rights are still in force. [LOGIE, J.:—Mr. McMaster, I wish to hear from you, first, as to whether the lien given by the Ontario legislation constitutes the municipality a secured creditor so that it has priority and is not a creditor of equal degree with the Crown upon a claim for damages for non-completion of a contract; and, secondly, with regard to the 1921 and 1922 taxes, whether they are expenses under the Act, and whether the Crown's priority applies to them.]

*McMaster*, K.C. (with him *J. W. McMaster*), for the defendant. As to the expenses I refer to *In re National Arms and Ammunition Co.*, 28 Ch. D. 474, at pp. 478, 479; *In re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322, 330; *In re Watson Kipling & Co.* (1883), 23 Ch. D. 500. No beneficial occupation by the liquidator has been shewn. We gave up the lease on a certain

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date, but we did not occupy the place at all. We carried on no business, we used no power. What we did was to stand aside and allow the Dominion Government and others interested to go in; and the Dominion Government did what was proper in the circumstances—it paid the taxes for the time it was beneficially occupying the premises. We never got one cent out of the property. It must be admitted that, if the Ontario Legislature could create a lien that was valid against the Crown, there would be difficulty; but the Ontario Legislature could not do that any more than it could pass an Act taking away the Crown's prerogative directly—it could not do it indirectly. The plaintiffs have no lien under the Assessment Act, R.S.O. 1914, ch. 195, sec. 94, except on the land. We have abandoned the land; the statute does not give any right against the liquidator, and does not give a lien on the goods. Reference to sec. 109 of the Assessment Act, where the expression is a "lien on land." Priority under sec. 109 by distress does not come into this case because the plaintiffs did not distrain. It is too late to bring in priority by distress after the winding-up has commenced: *Fuches v. Hamilton Tribune Co.*, 10 P.R. 409. In 1917, by 7 Geo. V. ch. 45, sec. 10, a new provision was added to sec. 109. It is fully discussed in *Re West & Co.* (1921), 59 O.L.R. 196, 2 C.B.R. 3. Section 109 was amended again in 1922, by 12 & 13 Geo. V. ch. 78: see secs. 24 and 30. [LOGIE, J., referred to *Gauthier v. The King*, 56 Can. S.C.R. 176.] The commissioners are in the same position as the municipality and have rights only in respect of buildings and liens on the buildings or land. The rates charged may be collected and levied in the same manner as municipal rates: Public Utilities Act, R.S.O. 1914, ch. 204, sec. 27. As to the prerogative right of the Crown, the defendant relies upon *Commissioners of Taxation for New South Wales v. Palmer*, [1907] A.C. 179, 182, 185, 186; *Attorney-General for New South Wales v. Curator of Intestate Estates*, [1907] A.C. 519, 523; *Regina v. Bank of Nova Scotia* (1885), 11 Can. S.C.R. 1; *Re W.* (1925), 56 O.L.R. 611, 613; *Re Adams Shoe Co. Ltd.* (1923), 54 O.L.R. 625, 628. Reference also to secs. 22 and 75 of the Winding-up Act.

*Kent*, in reply, discussed the cases and statutory provisions cited.

May 27. LOGIE, J.:—In my opinion the Crown in the right of the Dominion Government has never given up its prerogative

right to priority for debts of every nature due to it as against creditors of equal degree except under the provisions of the Bankruptcy Act, and then only to the extent therein contained. The Provincial Legislature has no power—as was said by Mr. Justice Audette in the case cited by Mr. McMaster, *Rex v. Powers*, [1923] Ex. C.R. 131, and also in other cases which have been quoted by counsel—of its own strength to take away the prerogative right of the Dominion. Nor am I troubled with the question of the degree of the creditors, and the statement of law that the Crown's prerogative extends to creditors of equal degree only. No lien or charge exists as against the shipbuilding company, or its assignee or the liquidator, by virtue of Ontario legislation, except upon the land; and upon the facts there is none upon the other assets of the company. In truth, the plaintiffs are creditors of equal degree with the Crown in its claim for unliquidated damages for the failure of the company to complete the ships for which the Department of Marine had a contract. And so the Crown, in my opinion, is to be preferred and has a prior prerogative right to be paid in preference to the city taxes, and in preference also to the claim of the Toronto Electric Commissioners under the Public Utilities Act, both of which claims are as against the liquidator in the nature of ordinary simple debts. The Dominion Shipbuilding and Repair Company Ltd. was wound up under the Dominion Winding-up Act. There was machinery, even in the early days of the Bankruptcy Act, under which in a proper case the winding-up proceedings might have been transferred to the Supreme Court of Ontario having jurisdiction in bankruptcy. This, in fact, was never done. The proceedings were taken and were always continued under the Winding-up Act of the Dominion Parliament. The liquidator of the Dominion Shipbuilding and Repair Company Ltd. had no alternative then, in the absence of an application being granted to transfer the winding-up to the Bankruptcy Court, but to admit the right of the Dominion to such priority and to pay the claim; and the Crown in the right of the Dominion had and was properly entitled to priority over all other claims of equal degree, against the Dominion Shipbuilding and Repair Company Ltd., including taxes, whether land or business, penalties or interest. It was admitted that no power was supplied to or used by the defendant as liquidator of the company and, notwithstanding Ontario legislation,

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the claim of the Dominion had priority to any claim of the Toronto Electric Commissioners for power supplied to the company.

As to laches, I make no finding, although there is enough evidence to justify the defence on this ground also.

Under these circumstances, finding as I do that the Crown in the right of the Dominion of Canada has a prerogative right to priority for its debt, the action will have to be dismissed.

As to the 1921 and 1922 taxes, the claim was made that they are expenses under the Winding-up Act: but, in view of the cases cited by Mr. McMaster, *In re Oak Pits Colliery Co.*, 21 Ch. D. 322, 330, and *In re Watson Kipling & Co.*, 23 Ch. D. 500, and no evidence being given as to any profitable use or beneficial occupation of the property by the liquidator, I find there is no right to these taxes superior to the right of the Dominion by reason of its prerogative.

The action will be dismissed with costs.

[RANEY, J.]

1931.

May 30.

## JARVIS V. OSHAWA HOSPITAL.

*Negligence—Injury to Pupil-dietitian Employed in Hospital—Operation of Dumb-waiter or Hoist—Findings of Trial Judge—Defective Condition of Hoist—Conflicting Evidence as to Instructions for Use—Contributory Negligence in Operation—Workmen's Compensation Act, secs. 1 (i), (p), and 118 to 122—Action—"Establishment"—"Workman"—Damages—Apportionment of Fault.*

The plaintiff, a pupil-dietitian, was employed by the defendant hospital at a small weekly salary, and was injured by an accident in the hospital, caused by the fall of a dumb-waiter or hoist which was used to carry food from the basement of the building to the second floor. The hoist is supported by a rope attached to a ring in the centre of the top. This rope is carried over a drum at the top of the shaft, and the hoist is counterbalanced by a weight in a closed-in slide. The hoist is raised and lowered by an endless rope which has nothing to do with its support. When the hoist is at rest on the basement floor, this rope is behind the shelves at either side of the car. There is a narrow door at the right hand side of the shaft which gives the operator direct access to the operating rope. The plaintiff on a day in September, 1928, loaded the hoist and then proceeded to raise it, not from the side door but from the front. To do so in this way, it was necessary to lift the hoist until there was a sufficient clearance under it to enable her to reach in and grasp the operating rope at the rear of the shaft. When the hoist was "about up," it fell. Both her hands were then on the operating rope and the rope was within the shaft. The falling hoist crushed her forearms against the ledge at the bottom of the shaft. It was not clear on the evidence whether the rope broke, or became de-

tached from the ring in the top of the car. There was no evidence of inspection of the supporting rope of the hoist after it was put up in 1918. The plaintiff admitted that she had been warned against operating the hoist from the front, but denied that she had been instructed in the use of the side door. She declared she had never seen that door used and was not aware of its existence, and had seen the hoist in operation every day by others. The superintendent's evidence was that she had instructed the plaintiff in the use of the side door:—

*Held*, upon the evidence, that the plaintiff knew of no other mode of operation than from the front; and, in the absence of a notice posted on the hoist requiring employees to use the side door, the hospital should not, on contradictory evidence, be absolved from all responsibility.

But, the hoist having been "about up" when it fell, it was not necessary that the plaintiff's hands should have been inside the shaft when the hoist fell.

There was thus negligence and also contributory negligence.

The hospital, being a private institution, not operated by or for the municipality, did not come within sec. 1(2) of the Workmen's Compensation Act, R.S.O. 1927, ch. 179, nor within Part I. of the Act; but the hospital was an "establishment" and the plaintiff a "workman" within the meaning of sec. 1, paras. (i) and (p), of the Act; and so Part II., secs. 118 to 122, was applicable; and, the hoist being defective and the plaintiff's injury caused by the defect, she was entitled to recover under Part II. and also at common law.

The damages were assessed at \$900 and the fault apportioned two-thirds to the defendant hospital and one-third to the plaintiff.

AN action for damages for personal injuries sustained by the plaintiff, a pupil-dietitian employed by the defendant, an incorporated hospital, by reason of the fall of a dumb-waiter which she was operating in the hospital, in September, 1928. She alleged a defective condition of the dumb-waiter or hoist which caused it to fall.

The action was tried before RANEY, J., without a jury, at Toronto.

*J. W. Pickup*, for the plaintiff.

*Fraser Grant*, for the defendant.

May 30. RANEY, J.:—The plaintiff was, in September of 1928, a pupil-dietitian employed at the Oshawa Hospital at a salary of \$8 a week. She claims damages from the hospital for personal injuries arising from an accident whilst employed by the hospital in that month. The plaintiff's injuries were caused by the fall of a dumb-waiter which was used to carry food from the hospital kitchen in the basement of the building to the second floor. She alleges that the accident was due to a defect in the hoist. The defence is a denial, with an allegation of contributory negligence.

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At the trial I had difficulty in understanding, from the description of the witnesses, the construction of the hoist and the manner of its operation. Counsel consenting, I went to Oshawa and looked it over for myself.

The car, which is about two feet square, has two shelves and is supported by a rope attached to a ring in the centre of the top. This rope is carried over a drum at the top of the shaft, and the car is counterbalanced by a weight in a closed-in slide. The car is raised and lowered by an endless rope which has nothing to do with the support of the car. When the car is at rest on the basement level, this rope is behind the shelves at either side of the car, making it difficult to raise the car from the front, especially when the car is loaded. To obviate this difficulty, there is a narrow door at the right hand side of the shaft which gives the operator direct access to the operating rope. Opening this door, the operator pulls up on the rope if he wishes to raise the car; or pulls down on it if he wishes to lower the car.

On the day of the accident, the plaintiff had gone to the kitchen and had loaded the car with a half-dozen bottles of milk and some bread. Then she proceeded to raise the car, not from the side door, but from the front. To do this in this way, it was necessary to lift the car until there was a sufficient clearance under it to enable her to reach in and grasp the operating rope at the rear of the shaft. When the car was "about up," as Miss Jarvis estimated, it fell. Both her hands were then on the operating rope and the rope was within the shaft. The result was that the falling car crushed her forearms against the ledge of the bottom of the shaft, which is about three feet above the floor. It is not clear on the evidence whether the rope broke, or became detached from the ring in the top of the car.

There was no evidence of inspection of the supporting rope of the car after it was put up in 1918. Such appliances do not last for ever, and sooner or later it was inevitable that the car would drop.

Then as to the plaintiff's alleged contributory negligence. The answer to this question turns upon the evidence of Miss McWilliams, the superintendent of the hospital, and of the plaintiff herself. Miss McWilliams testified that she had instructed Miss Jarvis in the operation of the lift when she came to the hospital. She said she took Miss Jarvis to the kitchen and demonstrated

the use of the side door, and warned her of the danger of operating the lift from the front. Later, she said, she found Miss Jarvis operating the lift from the front and told her it was not a safe procedure. Miss Jarvis admitted that she had been warned against inserting her head or hands under the car, but denied emphatically that she had ever been instructed in the use of the side door; she declared she had never used it or seen it used, and she said she saw the lift in operation every day by others. Indeed, she said she was not aware of the existence of the door at the side.

Both witnesses appeared to me to be frank and to be trying to tell the truth. I could not reject the plaintiff's statement without impugning her truthfulness. On the other hand, the superintendent, having many novices to instruct, may have confused the plaintiff with another in her evidence as to the demonstration of the side door. This is the view I think I ought to take. This point could have been put beyond controversy by a notice posted on the hoist in the kitchen requiring hospital employees to use the side door for the operation of the hoist, and forbidding them to operate it from the front. In the absence of such a notice, I ought not, I think, to absolve the hospital from all responsibility, on contradictory evidence.

There was a misunderstanding between Miss McWilliams and Miss Jarvis. Miss McWilliams thought she had demonstrated to Miss Jarvis the proper method of operating the hoist. I am satisfied that Miss Jarvis knew of no other mode of operation than from the front.

In her examination in chief, the plaintiff said that it was unnecessary to have her hands under the dumb-waiter when operating it. Later, on cross-examination, she said that she had to put her hands inside the shaft to operate the dumb-waiter. It is possible, I think, to reconcile these apparently contradictory statements. I judge from the evidence, and from observation of the elevator, that it is necessary when the dumb-waiter is being operated from the front, for the operator to have her hands inside the shaft until the car has been raised part way, but that when the car is higher up the rope may be drawn forward through the opening in the front, and that it is not then necessary for the operator's hands to be inside the shaft. The car having been "almost up" when it fell, I conclude that it was not necessary that Miss Jarvis's hands should have been inside the shaft when the car fell.

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It was also said that the plaintiff had overloaded the car. The blue print of the directions for erecting the dumb-waiter, put in by the defence as exhibit 2, is marked "Load 100 lbs." The load at the time of the accident was, I judge from the evidence, not half of that. The car was not overloaded.

The Oshawa Hospital is a private institution, not operated by or for the municipality, and so would not come within subsec. 2 of sec. 1 of the Workmen's Compensation Act, R.S.O. 1927, ch. 179, nor within Part I. of the Act. But it is argued that Part II. of the Act, which applies to industries as to which the Workmen's Compensation Board has no authority, and to workmen employed in such industries, and which consists of secs. 118 to 122, inclusive, does apply. Section 119 reads:—

"Where personal injury is caused to a workman by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of his employer . . . the workman . . . shall have an action against the employer, and . . . he shall be entitled to recover from the employer the damages sustained," etc.

Section 118 provides that sec. 119 shall apply only to industries to which Part I. does not apply, and to workmen employed in such industries.

Is the hospital an "industry?" Is the plaintiff a "workman?"

By the interpretation section of the Act, sec. 1 (para. (i)), "industry" includes "establishment, undertaking, trade and business;" and "workman" (para. (p)) includes "a person who has entered into or works under a contract of service or apprenticeship." I was not referred to any authority—counsel said there was none—but I see no reason to doubt that the hospital is an "establishment" or that Miss Jarvis was a "workman."

"Domestic or menial servants" are, by sec. 122, excluded from the benefits of the Act, and counsel for the hospital argued that Miss Jarvis's hiring with the hospital brought her within these words. I think not.

The hoist was defective, and the plaintiff's injury was caused by the defect.

Miss Jarvis is therefore entitled to recover under Part II. of the Act.

She is also entitled to recover under the common law: *Schwoob v. Michigan Central Railway Co.* (1905), 9 O.L.R. 86. In either case the basis of her claim is the same.

But there was contributory negligence on her part. It was not necessary to the operation of the dumb-waiter from the front that her arms should have been within the shaft at the time when the car fell, and she had been warned against that.

I assess the damages at \$900 and apportion the fault two-thirds to the defendant and one-third to the plaintiff. The plaintiff will have judgment for \$600 with costs.

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[IN BANKRUPTCY.]

RE SOCIETY SHIRT CO. LTD.

1931.

June 6.

*Bankruptcy — Motion for Receiving Order — Status of Petitioning Creditor — Extra Provincial Corporation without Licence in Ontario—Application of Extra Provincial Corporations Act, sec. 15—"Creditor"—Definition of.*

The prohibition in sec. 15 of the Extra Provincial Corporations Act, R.S.O. 1927, ch. 219, against a company maintaining an action or any other proceeding in any court in Ontario without a licence, when such licence is required under the provisions of that Act, does not apply to the presentation of a petition for a receiving order in bankruptcy.

The words "any court in Ontario," in sec. 15, cannot, having regard to the definition of "court" in the Bankruptcy Act, R.S.C. 1927, ch. 11, sec. 2(1), mean a court established under Dominion legislation. *In re Nelson Ford Lumber Co. Ltd.* (1908), 1 Sask. L.R. 108, distinguished.

The definition of "creditor" in the Act is not to be narrowed so as to mean a creditor entitled to bring action within Ontario to enforce its claim.

An appeal by the Society Shirt Company Ltd., the debtor company, from the order of the Registrar in Bankruptcy, dated the 16th April, 1931, after the trial of an issue which was referred to him for trial by order of McEvoy, J., dated the 31st March, 1931.

The issue was as to whether the petitioning creditor, S. S. Walley & Company Ltd., was entitled to succeed in its motion for a receiving order against the Society Shirt Company Ltd.; and the Registrar found that it was.

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May 14. The appeal was heard by SEDGEWICK, J., sitting in Bankruptcy.

*B. Luxenberg*, for the debtor company.

*R. H. Sankey*, for the petitioner.

June 6. SEDGEWICK, J.:—The questions to be tried were decided in favour of S. S. Walley & Company Ltd., the plaintiff in the issue, and in the result it would be entitled to succeed on its motion for a receiving order against the Society Shirt Company Ltd.

The debtor appeals from the order. I indicated on the hearing of the appeal that, in my judgment, the appeal ought to be dismissed on all points, except the point, raised before the Registrar, that S. S. Walley & Company Ltd. was not entitled to present a petition for a receiving order in bankruptcy, in a court in Ontario, because it is a company incorporated in Great Britain, with a resident agent in Ontario, but not having a licence under the Extra Provincial Corporations Act, R.S.O. 1927, ch. 219.

I have come to the conclusion that the Registrar was right in holding that the prohibition against a company maintaining an action or other proceeding in any court in Ontario without a licence, when such licence is required under the provisions of the Extra Provincial Corporations Act, does not apply to the presentation of a petition for a receiving order in bankruptcy.

I was referred to a decision in *In re Nelson Ford Lumber Co. Ltd.* (1908), 1 Sask. L.R. 108, where the court refused to recognise an unlicensed petitioner for a winding-up order as being a creditor entitled to present a petition under the Winding-up Act. I am not bound by that decision, and I think it is quite possible that a clear distinction can be drawn between the Winding-up Act and the Bankruptcy Act.

The prohibition in the Extra Provincial Corporations Act, sec. 15, is that an unlicensed company "shall not be capable of maintaining any action or other proceeding in any court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to" the provisions of the Extra Provincial Corporations Act.

I do not think that "action or other proceeding in any court in Ontario" applies to a proceeding in the Bankruptcy Court, which is in effect a court established by a Dominion Act to enforce a

Dominion statute. The word "court" is defined in the Bankruptcy Act, sec. 2(1), as "the court which is invested with original jurisdiction in bankruptcy under this Act." I do not think that the words "any court in Ontario" in the Extra Provincial Corporations Act can be held to mean a court established under Dominion legislation. I do not think it could possibly apply to an action in Ontario in the Exchequer Court of Canada.

The appellant also contends that "creditor" in the Act can only mean a creditor entitled to bring action within Ontario to enforce its claim. I can see no reason for narrowing the definition of creditor to this extent. The ordinary meaning of "creditor" is the meaning that must be taken, unless there is something in the Act to control that meaning, and there is no reasonable doubt that the ordinary meaning of "creditor" is a person to whom another owes a debt.

The appeal will therefore be dismissed with costs.

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[WRIGHT, J.]

BANK OF MONTREAL V. SHEAN.

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June 8.

*Assignments and Preferences—Assignment to Creditor of Interest in Estate of Deceased Intestate—Assignment Contested by Execution Creditor Appointed Receiver by Way of Equitable Execution—Sale of Land by Administrator under Devolution of Estates Act with Assent of all Persons Interested in Estate—Assignment of Interest not under Seal—Whether Assignment Preferential—Attack upon not Made within Sixty Days—Assignments and Preferences Act, sec. 4, subsecs. 3, 4—Absence of Intent to Give and Receive Unjust Preference—Knowledge of Insolvency.*

The plaintiff bank, in January, 1929, recovered a judgment against the defendant J. for a money demand, and on the same day lodged an execution in the sheriff's hands for the judgment debt and costs. A few days later the bank obtained an order of the Court appointing it interim receiver of the interest of J. in the property of his deceased brother to which J. became entitled upon his brother's death intestate on the 2nd October, 1928. In February, 1929, the bank was appointed permanent receiver. Letters of administration with the will annexed of the brother's estate were granted to a person on the 5th March, 1929. The property of the deceased consisted in part of real estate, which the administrator sold and conveyed on the 27th June, 1929, all the parties entitled to share in the estate joining in the conveyance. The share of the defendant in the proceeds of that sale and of personal estate of the deceased were paid into court. The defendant S. claimed to be entitled to the share of the defendant J. to satisfy a claim against him upon certain promissory notes, and he obtained from the defendant J. an assignment of all the interest of J. in the estate of his brother, for the purpose, as recited in the

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assignment, of allowing S. to reimburse himself to the extent of the amounts due and interest. Notice of this assignment was given to the administrator on the 24th November, 1928. The claim of S. was contested by the bank and other creditors of J.:—

*Held*, upon an issue directed to be tried, that, when the bank's execution was lodged with the sheriff, the lands were vested in the administrator, and he had the power of sale in respect thereof, under the Devolution of Estates Act, subject to obtaining the assent of all the persons entitled to share therein, which he obtained; and, although the bank's execution was in the sheriff's hands before the sale, the bank had not thereby a superior right over all other creditors of J.

*Held*, also, that the assignment to S. of J.'s interest in the estate generally was not a conveyance of land and was not required to be under seal.

*Held*, also, that, although S. knew, at the time of the assignment, that J. was financially embarrassed in respect of a chattel mortgage, that was not of itself knowledge of insolvency.

*Re Webb* (1921), 51 O.L.R. 5, followed.

And *held*, that the assignment did not amount to a preference, within the meaning of the Assignments and Preferences Act, R.S.O. 1927, ch. 162.

The assignment was not attacked within sixty days after it was made, and so the presumptions under subsecs. 3 and 4 of sec. 4 of that Act did not arise.

And there was not an intention on the part of J. to give and on the part of S. to obtain an unjust preference; and therefore the assignment could not be successfully attacked.

*Dana v. McLean* (1901), 2 O.L.R. 466, *Benallack v. Bank of British North America* (1905), 36 Can. S.C.R. 120, and *Re Webb*, *supra*, applied.

The issue was therefore found in favour of S.

AN issue directed, by an order of KELLY, J., dated the 1st November, 1930, to be tried in order to determine who is entitled to moneys directed by that order to be paid into court. The order provided that the question to be tried should be, "What interest, if any, the plaintiff and the defendants in such issue have in the moneys so paid into court, and the priority of interest, if any, of the plaintiff and the defendants in the said moneys."

The issue was tried before WRIGHT, J., without a jury, at London.

*J. C. Makins*, K.C., for the plaintiff.

*J. Murray*, for the defendant Shean.

*Lyle Ramsey*, for the defendants McLean & Hawes and W. F. Levy.

No one for the other defendants.

June 8. WRIGHT, J.:—The moneys in question amounted, at the date of the order, to the sum of \$2,660, and represented the share of one L. James Johnstone in the estate of his brother Robert

John Johnstone, deceased, then in the hands of the administrator with the will annexed of the said deceased.

The plaintiff bank recovered judgment against the defendant L. James Johnstone on the 7th January, 1929, for \$2,343 debt and \$56.90 for costs, and on the same day issued an execution to the Sheriff of the County of Middlesex for the said judgment debt and costs.

Thereafter, on the 12th January, 1929, the plaintiff bank obtained an order of this Court appointing it interim receiver of the share, estate, and interest in the property of the said Robert John Johnstone, deceased, to which the defendant was entitled, and by an order dated the 7th February, 1929, the plaintiff was appointed permanent receiver. The plaintiff bank now bases its claim on the said judgment and the order appointing it receiver as aforesaid.

Robert John Johnstone, a brother of the defendant L. James Johnstone, died on the 2nd October, 1928, leaving a will whereby he appointed his wife to be sole executrix, and devised all his property to her.

The beneficiary under this will predeceased the testator, so that there was, in effect, an intestacy, and letters of administration with the will annexed were granted to one George Johnstone, on the 5th March, 1929.

As already stated, the share of the defendant L. James Johnstone amounted to the sum of \$2,660. The property of the deceased consisted, among other things, of real estate in the township of London, in the county of Middlesex.

George Johnstone, the administrator, sold this property under the provisions of the Devolution of Estates Act, and conveyed the same to the purchaser thereof on the 27th June, 1929.

All the parties entitled to share in the estate joined in the said conveyance as consenting parties thereto, pursuant to the provisions of the Devolution of Estates Act, and the moneys paid into court are in part the proceeds of the said real estate, and the remainder is made up of personal estate belonging to the said Robert John Johnstone, deceased.

The defendants McLean & Hawes and Levy have judgments in the Division Court against the defendant L. James Johnstone, and their executions are outstanding and unsatisfied.

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The defendant Shean claims to be entitled to the share of the defendant L. James Johnstone in the estate of his brother Robert John Johnstone, deceased, under the following circumstances.

This defendant testified that he worked for L. James Johnstone from 1911 to 1923 as a farm labourer, and that in part payment he received promissory notes which were from time to time renewed. Notes were produced at the trial, dated as follows:—

(1) Note dated the 1st September, 1925, payable on demand, for \$668.54.

(2) Another note bearing the same date, and for the same amount, viz., \$668.54, payable also on demand.

(3) Note dated the 1st July, 1926, payable six months after date, for \$740, plus the interest on a former note, which was dated the 18th August, 1920, for \$740.

The defendant Shean testified that no sum whatever was paid on these notes, and that the full amount still remained due.

Upon the death of Robert John Johnstone, the defendant Shean learned that the defendant L. James Johnstone was entitled to a share in the estate of the deceased, so he consulted his solicitors, and they obtained from L. James Johnstone an assignment of his interest in the estate, which assignment was produced at the trial, as exhibit No. 7.

This assignment purports to assign all the right, title, and interest that either L. James Johnstone or his wife Emily G. Johnstone may now have or may in the future acquire in and to the estate of Robert John Johnstone. The assignment contains the following clause:—

“We make this assignment only for the purpose of allowing Clarence Shean to reimburse himself to the extent of the amounts due and interest, and with the further understanding that the said Clarence Shean will refund to us any moneys over and above the money due him on the above mentioned notes.”

Notices of this assignment was duly given to the administrator of the estate on or about the 24th November, 1928.

The claim of the defendant Shean is contested by the plaintiff and the other defendants who appeared at the trial, on the following grounds:—

1. That the said assignment is not under seal.

2. That the same constitutes a fraudulent preference, within the meaning of the Fraudulent Conveyances Act, R.S.O. 1927, ch. 162.

It is further contended on behalf of the plaintiff that, as its execution was filed with the Sheriff before the sale of the property of Robert John Johnstone, deceased, such execution bound the interest of the defendant L. James Johnstone in the said lands, and therefore that the plaintiff bank had a superior right over all the other creditors, at least to the extent of its costs.

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Dealing with this last contention, I do not think it is entitled to prevail. When the execution was filed with the Sheriff the lands were vested in the administrator with the will annexed of the said deceased, and he had the power of sale in respect of the same, under the Devolution of Estates Act, subject to obtaining the assent of the other parties entitled to share therein. This he obtained, and I think the administrator was competent and authorised to convey the land as he did.

Dealing with the contention that the document is not under seal, I do not think this objection is tenable. It did not purport to convey land, but merely assigned the interest of L. James Johnstone in the estate generally, and I know of no law which requires such assignment to be under seal.

The most serious contention, however, is that the assignment amounts to a preference, within the meaning of the Assignments and Preferences Act, R.S.O. 1927, ch. 162.

The evidence at the trial disclosed that the defendant L. James Johnstone had not, within Ontario, property sufficient to satisfy his creditors in full at the date he made the assignment, and so he may be treated as being in insolvent circumstances on the date of the said assignment.

The defendant Shean testified that he did not know of any debts of the said L. James Johnstone which were outstanding at the date of the assignment, but had heard some years before that there was some balance due to a chattel mortgagee in respect of a chattel mortgage which L. James Johnstone had given, under which the proceeds of the sale of the goods were not sufficient to satisfy the amount due.

I accept the evidence of the defendant Shean that he did not know that L. James Johnstone was, at the date of the assignment, in insolvent circumstances, and I also accept his evidence as to the genuineness of the transactions in respect of which he obtained the promissory notes produced at the trial. I find that the amount

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represented by these notes was, and is, actually owing to the defendant Shean by the defendant L. James Johnstone.

The mere fact that Shean knew of L. James Johnstone's financial embarrassment in respect of the chattel mortgage transaction is not of itself knowledge of insolvency. This point was decided by Mr. Justice Orde in *Re Webb* (1921), 51 O.L.R. 5. It will be noted that the assignment was not attacked within sixty days after the same was made, so that the presumptions which would in that event arise under subsecs. 3 and 4 of sec. 4 of the Assignments and Preferences Act, do not arise here, and those subsections cannot avail to the benefit of the contesting creditors.

The transaction in question can only be attacked successfully when there is an intention on behalf of both the debtor and the creditor to create a preference. There must be an intention on the part of the debtor to give, and an intention on the part of the creditor to obtain, an unjust preference. Here I find that there was no such intention—certainly not on the part of the defendant Shean.

The decisions in the cases of *Dana v. McLean* (1901), 2 O.L.R. 466, and *Bennallack v. Bank of British North America* (1905), 36 Can. S.C.R. 120, and *Re Webb*, apply to the facts in this case, and therefore the transaction cannot be successfully attacked. There was a *bonâ fide* debt to the creditor Shean. There was no knowledge on his part of the insolvency of L. James Johnstone, and there was no intent on his part to acquire or obtain a fraudulent preference over the other creditors. All these things concurring, it follows that the assignment must be held valid, and the defendant Shean is entitled to the proceeds of the estate so far as necessary to satisfy the promissory notes held by him, and there will be judgment in accordance with this finding. According to my computation, there was due to the defendant Shean at the date of payment into court, for principal and interest on the promissory notes held by him, more than the amount so paid in, so the defendant Shean will be entitled to all the moneys so paid into court.

The defendant Shean will be entitled to his costs of action as against the plaintiff.

I make no order as to the costs of the other defendants, except that they shall bear their own costs.

## [APPELLATE DIVISION.]

## CITY OF TORONTO v. POWELL.

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June 12.

*Assessment and Taxes—Income Tax—Imposition upon Deceased Person—Assessment Act, sec. 98(3)—City By-laws—Action against Executrix.*

The judgment of ROSE, C.J. (1931), *ante* 172, was affirmed.

*Sifton v. City of Toronto*, [1929] S.C.R. 484, applied and followed.

AN appeal by the plaintiff city corporation from the judgment of ROSE, C.J. (1931), *ante* 172.

June 12. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*J. P. Kent*, for the appellant corporation, argued that, when the assessment roll was revised in 1928, sec. 98(3) of the Assessment Act, R.S.O. 1927, ch. 238, brought the deceased Mr. Powell under an obligation to pay such tax in respect of income as might, upon the basis of the roll, be imposed upon him in 1929. Upon Mr. Powell's death in 1928 the obligation became an obligation of his estate, and upon the adoption of the roll and the imposition of the tax in 1929 the obligation of the estate became enforceable against the executrix of his will. Reference to *Sifton v. City of Toronto* (1929), 63 O.L.R. 397; *Re Palmer and City of Toronto* (1924), 26 O.W.N. 84; *City of Toronto v. Quebec Bank* (1917), 40 O.L.R. 544; *In re Home Bank of Canada* (1925), 5 C.B.R. 676.

*Samuel Rogers*, for the defendant, respondent, was not called on.

At the close of the argument for the appellant corporation, the judgment of the Court was delivered by LATCHFORD, C.J.:—It is impossible to distinguish this case from *Sifton v. City of Toronto*, [1929] S.C.R. 484. Both turn on sec. 98, subsec. 3, of the Assessment Act, R.S.O. 1927, ch. 238. Powell was dead when the tax was levied by by-law. If, as held in the *Sifton* case, a person who had moved out of the municipality could not be taxed for income, although assessed, a person who had died was equally out of the municipality, and so could not be taxed.

*Appeal dismissed with costs.*

## [APPELLATE DIVISION.]

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RE NATIONAL TRUST CO. LTD. AND CITY OF TORONTO.

June 12.

(FUDGER CASE)

*Assessment and Taxes—Income Assessment—Assessment in 1930 of Executor of Person Dying in March, 1930, in Respect of Income Received in 1929—Assessment Amendment Act, 1930, 20 Geo. V. ch. 46, sec. 3, Enacting New secs. 12 and 13 of Assessment Act—Whether Retroactive—Subsecs. 3 and 4 of sec. 13—Intra Vires—Direct Taxation—Constitutional Law.*

The executor of F. was in 1930 assessed by the city corporation in respect of income received by F. during 1929. F. was a resident of Toronto and died in March, 1930, before any assessment was made:—

*Held*, that the assessment was unauthorised and improper.

The amendments made to the Assessment Act by the Assessment Amendment Act, 1930, 20 Geo. V. ch. 46, do not justify the assessment of the legal personal representative of a deceased person in respect of income received by him prior to the 1st January, 1930. The amendments have no retroactive operation either over persons or income as to any period before that date.

The amendments embodied in sec. 3 of the Act of 1930 do not justify the argument that the new power given to the municipality to assess the personal representative applies to income received before the amendment came into force, and there is nothing in the Assessment Act itself to support the argument.

*Per* MASTER, J.A.:—If the Act of 1930 were applicable, the assessment would have been valid. That legislation has so strengthened and extended the jurisdiction of the authorities empowered to make and settle municipal assessment rolls as to obviate or overcome the deficiencies indicated by *Re Kemp and City of Toronto* (1930), 65 O.L.R. 423.

The tax which is imposed directly upon the personal representative is none the less a direct tax even though he is taxed in his representative capacity, and is entitled to indemnify himself out of the estate. The tax, when once lawfully imposed, having regard to the estate in his hands, is in law and in fact levied against and payable by him personally. The municipality looks to him and not to the estate for payment.

*City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117, followed.

*Held*, therefore, upon a case stated by a County Court Judge, that the executor of F. was not properly assessed; and that subsecs. 3 and 4 of sec. 13 of the Assessment Act, as enacted by the Assessment Amendment Act, 20 Geo. V. ch. 46, sec. 3, are *intra vires* of the Legislature of Ontario.

THE following statement is taken from the judgment of MASTER, J.A.:—

This is an appeal by the National Trust Company, on a special case stated by his Honour Judge Denton, Senior Judge of the County Court of the County of York, pursuant to sec. 84 of the Assessment Act, R.S.O. 1927, ch. 238.

The special case so stated reads as follows:—

The late Harris H. Fudger, who was a resident of the city of Toronto, died on the 18th day of March, 1930, and probate of his will was granted on the 16th day of May, 1930, to the National Trust Company Ltd., the executor and trustee named in the will, and a notarial copy of such probate is hereto annexed.

On the 12th day of February, 1930, the late Harris H. Fudger made a return to the assessment commissioner of the income received by him for the year ending the 31st December, 1929.

The assessor in the assessment roll prepared in the year 1930 has assessed the National Trust Company Ltd. as executor of Harris H. Fudger for the sum of \$87,260 for the income shewn in said return. The amount of the assessment is not in dispute.

From such assessment the appellant appealed to the Court of Revision and the appeal was heard on the 27th day of October, 1930, and judgment was given on the 29th day of October, 1930, dismissing the appeal.

The appellant then appealed to the County Judge of the County of York from the decision of the Court of Revision, and the appeal came on for hearing before me on the 26th day of November, 1930.

On the hearing of said appeal the appellant requested me to make a note of the questions of law and construction of statutes raised by it, and to state the same in the form of a special case for a Divisional Court, should my judgment be adverse to the appellant.

After hearing argument, I reserved judgment and further written arguments were submitted, and on the 15th day of December, 1930, I delivered judgment dismissing this appeal and other similar appeals, for reasons stated in writing, which are annexed hereto and which form part of this case.

At the request of the appellant, and upon the consent of the respondent, I have granted this special case pursuant to sec. 84 of the Assessment Act. The questions of law and construction of the statutes which I now submit to the Appellate Division are as follows:—

1. Was I right in holding that under the provisions of the Assessment Act and the amendments thereto, the National Trust Company Ltd., executor of the last will and testament of Harris H. Fudger, deceased, was properly placed on the assessment roll and assessed in the year 1930 in respect of the income received by the late Harris H. Fudger, deceased, during the year 1929?

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2. Was I right in holding that subsecs. 3 and 4 of sec. 13 of the Assessment Act, as enacted by 20 Geo. V. ch. 46, sec. 3, are *intra vires* of the Legislature of Ontario?

March 30. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, JJ.A.

*R. S. Robertson*, K.C., and *N. B. McPherson*, for the appellant. Whether regarded as a tax *in rem* or a tax *in personam*, sec. 13 of the Assessment Act, as amended by ch. 46 of the statutes of 1930, sec. 3(1), is ineffective to authorise this tax. If the interpretation of the Assessment Act as amended is that the very income received by Fudger in 1929 is taxed, that is, if this is an assessment and tax *in rem*, then it is ineffective, because Fudger's income in 1929 never existed as income in the hands of Fudger's executors when the assessment in question took place, and so there was no *res* on which the assessment and tax could fasten in the hands of the executors. If the tax is a tax *in personam*, as we submit it is, being a tax against the executor in his representative capacity, then it is an indirect tax because the words of the section shew that it is necessarily intended that the executor should be indemnified out of the estate in its hands. The income received by Fudger in 1929 is non-existent, and is in exactly the same position as that of the late Sir Edward Kemp in the case of *Re Kemp and City of Toronto* (1930), 65 O.L.R. 423. Being an indirect tax, it is *ultra vires* the Provincial Legislature to impose it. If the executor paid the tax out of the 1930 or 1931 income of the estate, it would be a tax on the widow, who is entitled to all the income from the estate, and it is therefore an indirect tax upon her. If the executor paid it out of the capital of the estate it would be an indirect tax on the beneficiaries: *Cotton v. The King*, [1914] A.C. 176; *City of Windsor v. McLeod*, [1926] S.C.R. 450; *Attorney-General for Quebec v. Reed* (1884), 10 App. Cas. 141; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario*, [1897] A.C. 231. This Act, being a taxing statute, must be construed strictly: *Cox v. Rabbits* (1878), 2 App. Cas. 473; *Tennant v. Smith*, [1892] A.C. 150. The amendment of 1930 does not apply, because Fudger had received the income in question before the 1st January, 1930, and the amendments have no retrospective operation. Both questions submitted should therefore be answered in the negative.

*G. R. Geary*, K.C., and *J. P. Kent*, for the Corporation of the City of Toronto, respondent. The tax in question is not an indirect tax but a direct one *in personam* on the executor in its representative capacity, and so is *intra vires* the Provincial Legislature. *City of Windsor v. McLeod*, *supra*, is overruled by the decision of the Privy Council in *City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117, and "direct taxation" is defined in that case. The question whether the tax is direct or indirect is not to be determined by the incidence of the tax in each particular case. This tax need not be paid out of the income which was received in 1929 by Fudger. It must be paid out of the fund or estate. The widow is not entitled to all the income and all the estate which comes into the trustee's hands. She is only entitled to the amount less the various charges for taxes, succession duties, debts, and administrative expenses, which the executor has to pay. It is immaterial whose money pays the tax. Income tax is a tax *in personam*. Reference to *Bank of Toronto v. Lambe*, *supra*, and *Rattenbury v. Land Settlement Board*, [1929] S.C.R. 52. The amendments of 1930 completely cured the legislative defects found in the *Kemp* case, so that that case cannot be relied on here. As to the 1930 amendments not applying, we submit that, after the Act came into force (3rd April, 1930), an assessment could be made in 1930 on the previous year's income. Reference to *Attorney-General of British Columbia v. Ostrum*, [1904] A.C. 144; *Erie Beach Co. Ltd. v. Attorney-General for Ontario*, [1930] A.C. 161; *McLeod v. City of Windsor*, [1923] S.C.R. 696. Both questions should therefore be answered in the affirmative.

*Edward Bayly*, K.C., for the Attorney-General for Ontario, outlined the history of the legislation, and adopted the argument which had been presented on behalf of the city corporation, in so far as it was applicable to shew that the tax was a direct tax, and so within the competence of the Provincial Legislature. If subssecs. 3 and 4 were read together, it was plain that the tax was a direct one. Reference to the *Fairbanks* case, *supra*, and the *Rattenbury* case, *supra*.

*Robertson*, K.C., in reply, contended that the tax was indirect, as it was not imposed upon the person who had received the income.

June 12. MASTEN, J.A.:—In discussing this appeal I desire to make two preliminary observations.

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First, having regard to the several provisions of the Assessment Act, R.S.O. 1927, ch. 238, and more particularly to sec. 4 and subsec. 1(b) of sec. 10, there can be no doubt that the pious intention of the Legislature is that the whole income received by the deceased down to the time of his death shall form a subject of taxation; and the sole question is, whether the language of the Assessment Act, as amended in 1928, 1929, and 1930, expressly and effectively provides means for making an assessment and levy in respect of such income during the period of two years after the death of the man who received the income.

Second, so far as the above question is concerned, this Court is admittedly bound by its own decision in the *Kemp* case, 65 O.L.R. 423, to hold that, prior to the enactment of the Assessment Amendment Act, 1930, ch. 46, and sec. 12 of the Municipal Amendment Act, 1930, ch. 44, the words employed by the Legislature had failed to authorise an assessment such as that here under consideration.

Consequently the present inquiry is narrowed to the question: "Has the legislation of 1930 so strengthened and extended the jurisdiction of the authorities empowered to make and settle municipal assessment rolls as to obviate or overcome the deficiencies indicated by the *Kemp* case?"

One difficulty indicated in that case, viz., that in the circumstances here existing the municipal corporation had no power to tax and that nothing is assessable which is not taxable, appears to me to have been completely overcome by sec. 12 of the Municipal Amendment Act, 1930, ch. 44.

The words of subsecs. 3 and 4 of sec. 13 of the Assessment Act, as enacted by the Assessment Amendment Act, 1930, sec. 3(1), require further consideration. The clauses referred to read as follows:—

"(3) Income received by a deceased person in his lifetime shall be liable to assessment and taxation subject to the exemptions to which the deceased person, if living, would have been entitled, and the executor, administrator or trustee of his estate shall be assessed in respect to such income, but only in his representative capacity and any income assessed under this subsection shall not be again assessed when the same has been distributed and received by the beneficiaries of the estate of the deceased person.

“(4) Any executor, administrator, trustee or agent failing to pay the income tax levied upon any assessment made under this section out of the fund or estate shall be personally liable therefor.”

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Considered apart from the rule laid down by the Privy Council in the *Halifax* case, to which I refer later, it appears to me that the section above quoted, read in connection with the other provisions of the Assessment Act and the Municipal Act, yield the following results:—

1. The receipt of income during his lifetime by the deceased is a *sine quâ non* of a liability to assessment and taxation, and that is all that is meant by the opening words of subsec. 3, “Income received by a deceased person in his lifetime shall be liable to assessment and taxation.” The phrase is in fact merely a reiteration of sec. 4 of the Assessment Act. The effective and operative words are those which follow: “The executor, administrator or trustee of his estate shall be assessed in respect to such income, but only in his representative capacity.” These words seem to make the real nature of the tax in question transparently obvious. While the receipt of income by the deceased is a *sine quâ non*, the tax is to be collected from the executor in his representative capacity, that is, normally he is to pay it out of the estate come to his hands and only if he neglects to do so does he become personally liable to pay out of his own assets. I note, however, in passing, that the words of subsec. 4 are wide enough, if read literally, to make the executor personally liable if the fund or estate is insufficient to meet the tax. Be that as it may, it is plain that the ultimate incidence of the tax is uncertain. Being payable by the executor in his representative capacity, it is obvious that it comes out of the capital of the estate in his hands. The payment depletes the gross amount of the estate in his hands. If the estate is insolvent, it comes out of the creditors, if solvent, out of the beneficiaries. In every case except where there is no estate, the executor is indemnified out of the estate, and the payment is intended by the very words of the Act to be passed on directly to some one else.

It is not a case where the executor is in effect made an agent of the municipality to collect and pay the tax in question, or where the executor becomes part of the machinery of collection,

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but on the contrary the executor is in the actual possession of the estate and as owner of the estate he and no one else is taxed.

Three different suggestions respecting the tax in question present themselves for consideration: (1) Is it a tax *in rem* on the very income received by Fudger in the year 1929? (2) Is it a tax *in rem* on the corpus of the Fudger estate in the hands of the executor? (3) Is it a direct tax *in personam* on the executor in its representative capacity?

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I proceed to consider the above suggestions in the order indicated.

The first suggestion is founded on the words of sec. 10, subsec. 2, of the Assessment Act, as amended in 1929, "The income to be assessed shall be the income received during the year ending on the 31st of December then last past."

If I correctly apprehend the argument of Mr. Robertson for the appellant, it is that the respondent was on the horns of a dilemma. Any tax must be either a tax *in rem* or a tax *in personam*, and in either case, though for different reasons, he contended that the statute is ineffective to authorise this tax.

On the first alternative he argues that, if the interpretation of the Assessment Act as amended (including sec. 10(2) as amended in 1929), is that the very income received by Fudger in 1929 is taxed, that is, if this is an assessment and tax *in rem* then it is ineffective, for Fudger's income of 1929, neither in whole nor in part, existed *as income* in the hands of Fudger's executors when the assessment in question took place, and so there was no fund, no *res* on which the assessment and tax could fasten in the hands of the executors. I agree with the appellant's argument so stated.

I fail to find in the legislation of 1930 anything affecting or modifying the conclusion at which this Court arrived in the *Kemp* case, namely, that the assessment and tax in question is not a tax *in rem* on past income. The reasons which led me to that conclusion are fully stated in the judgment in the *Kemp* case, 65 O.L.R. at p. 430 *et seq.*, and I do not repeat them. They are equally applicable in the present case. I desire to add, however, that the opinion there expressed seems to me to receive support from the phraseology of subsec. 3 above quoted, namely, that "The executor, administrator, or trustee of his estate shall be

assessed" (and taxed) "in respect of such income but only in his representative capacity."

I deal with Mr. Robertson's second alternative at a later stage of this judgment.

The second of the suggestions noted above is that which commended itself to the Court below. In his able judgment Judge Denton says:—

"The section of the Assessment Act with which we are now concerned in this appeal provides that the executor, the administrator, trustee or agent, failing to pay the income tax levied upon any assessment made under this section out of the fund or the estate shall be personally liable therefor. To use the language of Duff, J., I think the proper inference to be drawn from this is that the primary source of payment is the trust fund, and the personal liability of the executors is designed only as a security for the proper application of the fund."

A statute which, after a man's income has been stopped by death, imposes annual taxes on his estate in the hands of his executor for two or three successive years, ought to receive a strict construction.

In other words, a court ought not to construe a statute as authorising such a tax by drawing inferences in its favour. The enactment should be in express terms. That the words of the statute are ineffective to fasten the tax as a lien or charge on the corpus of the estate seems to me to be determined by the reasoning in the judgment of the Supreme Court in *City of Windsor v. McLeod*, [1926] S.C.R. 450. That case related to assessability of income under subsec. 3 of sec. 13, but the *ratio decidendi* is applicable here. At pp. 455, 456, and 457, Anglin, C.J.C., speaking for the Court, says:—

"It is equally clear that no attempt has been made to fasten the tax as a lien or charge on the income. The section does not enjoin retention of it, or of any part of it, to meet the tax. This omission is most significant in the case of an agent, one of whose primary duties is the prompt remittance of moneys collected to his principal: yet the mere agent is made liable for the tax equally with the trustee, etc. The municipality is not given the right to attach or impound or otherwise reach the income directly. Its only recourse is personal against the trustee. Nor is there any clear expression of the restriction of the liability of the

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 1931 sec. 37(12) already adverted to.

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“But it is contended that this restriction is implied in the direction of subsec. 3 of sec. 13 that the assessment of the agent, administrator, trustee, etc., shall be *‘on behalf of the estate.’* We are, however, unable to find in this equivocal phrase evidence of an intent on the part of the legislature to depart in this instance from the general scheme of the Assessment Act, so clearly manifested in the sections above alluded to, that the liability of the person assessed shall be for a debt due to the municipality and, therefore, unrestricted. The office of the words directing that the assessment shall be *‘on behalf of the estate’* would rather seem to be to make clear—perhaps quite unnecessarily—the right of the person so assessed to recoupment out of the funds of the estate (R.S.O. 1914, ch. 121, sec. 35), or as put by Mr. Justice Ferguson, ‘to pass the tax on to the beneficiary.’

“An example of language apt to convey the intention to relieve the person to be assessed from personal liability beyond the estate property in his hands is found in a provision of the Quebec Succession Duty Act (4 Geo. V. ch. 10) dealt with in *Alleyne-Sharples v. Barthe*, [1922] 1 A.C. 215, at p. 228:—

“No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails so to do may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only.”

“The suggestion that all this was present to the minds of the Ontario legislators and was meant to be covered and intended to be enacted by the phrase ‘assessed . . . on behalf of the estate,’ imposes too great a strain on curial credulity.”

Had it been the conscious intention of the Legislature of Ontario to have rendered the corpus of the estate a fund upon which the tax formed a charge or lien, it would have been a simple matter to have enacted as follows: “If any person in receipt of a taxable income dies, his estate shall during the three calendar years next succeeding his death be liable to assessment

and taxation measured in each year by the income received by the deceased in the second calendar year prior to such levy." App. Div.

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The third suggestion presented is that the tax is a tax *in personam* on the executor. In my opinion that is the effect of the enactment under consideration and its true construction. What is sought on this appeal is a confirmation of the action of the authorities below in placing the name of the appellant as executor of Fudger on the roll. If the name of the appellant remains on the roll as executor, then, when the rate is struck and the tax is levied, sec. 12(1) of the Municipal Amendment Act, 1930, applies and the levy is made "on the whole ratable property according to the last revised assessment roll." Therefore the levy would be on the appellant company in its representative capacity as executor of Fudger, whereupon sec. 98(1) of the Assessment Act applies. It is thereby provided that the taxes payable by any person may be recovered with interest and costs as a debt due the municipality. Consequently the municipality would be entitled to enforce payment of the tax in question by suit against the appellant as executor of Fudger. These considerations make it plain to my mind at least that the effect of the statute is to make this a tax *in personam* against the executor in its representative capacity rather than to create a charge *in rem* against the corpus of the estate.

Mr. Robertson argues that, as the tax is against the executor *in his representative capacity*, the statute itself makes the tax indirect because these words shew that it is necessarily intended that the executor shall be indemnified out of the estate in its hands: *Cupear School District Trustees v. Security Trust Co.*, [1919] 1 W.W.R. 615.

On this phase of the appeal the crucial question seems to be, "Is this tax direct and *intra vires* of the Provincial Legislature, or is it indirect and so *ultra vires*?" Before the decision in *City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117, this Court would have determined that question by applying the definition of John Stuart Mill, "A direct tax is one which is demanded from the very person who is intended or desired to pay it, while indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Applying that formula and following the decision of the

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Supreme Court of Canada in *City of Windsor v. McLeod*, [1926] S.C.R. 450, this tax would have been adjudged to be indirect, because the executor pays it in its representative capacity with a right of indemnity from the beneficiaries of the estate.

But Lord Cave's judgment in the *Fairbanks* case, at p. 125, contains this clear decisive statement:—

"When therefore the Act of Union allocated the power of direct taxation for provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, of property and income, should belong exclusively to the provincial legislatures, *and that without regard to any theory as to the ultimate incidence of such taxation.*"

If the tax here in question is an "income tax," as that term was understood in 1867 when the British North America Act was passed, the *Halifax* case compels us to hold that it is a "direct tax," without regard to any theory as to the ultimate incidence of such taxation.

Thus the issue is resolved into the narrow question, "Is this an income tax, as the term was understood in 1867, or is it a new or unfamiliar tax to which Mill's formula is to be applied for the purpose of determining to which category of taxation it ought to be assigned?"

On the question so stated various considerations *pro* and *con* are presented.

On the one hand it may be said that this is undoubtedly a *tax*; that it is a tax which originates from and is founded on the income received by the testator in 1929, and the quantum of which is measured by that income; that an inchoate liability arose on the receipt by Fudger of his income in 1929, which became perfected by subsequent assessment and levy against the executor pursuant to the statute here in question; that the statute contemplates that Fudger's death shall not absolve him from this inchoate liability, but it shall pass to his executor, and hence that from beginning to end it is an "income tax."

On the other hand, it may be said that from 1866, when taxation of income was first introduced into Ontario, down to the time when the legislation now in question was enacted, no such tax as this could be assessed or levied on an executor. See the *Kemp* case, 65 O.L.R. 523, and particularly the observations of Orde, J.A., at pp. 443 and 444.

Hence in 1867, when the British North America Act was passed, such a tax as this was unknown and was not in contemplation; until this Act was passed, the only tax known as an income tax was a tax on a living person who had received an income; by the legislation in question the municipal corporation is empowered to create a post-mortem debt payable by the executor of the deceased in its representative capacity; and in that aspect this tax might well be considered as a new and unfamiliar tax on a person not theretofore taxable.

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Balancing these considerations against one another as best I can, I have arrived, though with great hesitation, at the conclusion that this tax though new in some aspects must nevertheless be classed as an income tax. It follows that under the rule expressly laid down by the Judicial Committee in the *Halifax* case we are precluded from any further or other examination or consideration of the nature of the tax or of its ultimate incidence. Being an income tax, it is a direct tax and so within the legislative competence of the Ontario Legislature.

Dealing with the points which were principally argued before us, I had written the foregoing observations before receiving the judgment which has been prepared by my brother Orde. I agree with his conclusion that the statutory provisions here in question do not apply in the present case; that is, do not apply either to persons or to income as to any period before the 1st January, 1930, when the amendments become effective.

The result is that the reasons which I had so far prepared are, strictly speaking, *obiter dicta*; but, as they relate to the issues which were principally debated before us, and may possibly be of some service either on a further appeal or in connection with taxation of estates to which the amendments apply, I have allowed them to stand as written.

The judgment should go in the terms proposed by my brother Orde.

LATCHFORD, C.J., agreed with MASTEN, J.A.

ORDE, J.A.:—In my opinion this appeal should be allowed and upon a very simple ground, namely, that the amendments to the Assessment Act made by the Assessment Amendment Act of 1930 do not justify the assessment of the legal personal representative of a deceased person in respect of income received by him

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prior to the 1st January, 1930. In other words, the amendments have no retroactive operation either over persons or income as to any period before that date.

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The more I have considered this case since the argument, the more difficult I have found it to understand the ground upon which the city is attempting to support this assessment. It seems to be founded upon the theory that, because income earned during a man's lifetime may be the basis of assessment and taxation against him if he lives, it ought to constitute the basis of assessment and taxation against his executor or administrator after his death. This theory is, of course, quite understandable. If the Legislature sees fit to enact in apt language that all income received in a man's lifetime, between the period in respect of which he was last assessed and the date of his death, shall subject his legal personal representative to assessment and taxation in respect thereof, then, subject to any question that might arise as to the directness or indirectness of such taxation, there could be little doubt as to the comprehensiveness of the legislation. But until 1930 the Legislature had never so legislated. The city sought in *Re Kemp and City of Toronto*, 65 O.L.R. 423, to establish that the provisions of the Assessment Act, R.S.O. 1927, ch. 238, and its amendments as they then stood, did, to some extent at least, enable a municipality to assess the executor in respect of income received by the testator in his lifetime. We held that that could not be done, and we made it clear that, as the law then stood, it was not possible to effect any assessment or taxation in respect of income received during a man's lifetime unless the assessment had been completed before his death. The only person assessable for income was the person who had received it.

The Legislature has now for the first time by the Act of 1930 declared that legal personal representatives may be assessed in respect of income received by a deceased person in his lifetime, but in considering the range and scope of the Act it is necessary to keep in mind the state of the law as it existed immediately prior thereto.

The *Kemp* case made it clear that, notwithstanding the sweeping declaration in sec. 4 of the Assessment Act that "all income derived . . . by any person resident" in Ontario "shall be liable to taxation," the Act itself nowhere imposes any assessment upon income in the nature of an assessment *in rem*, but only

assesses some person in respect thereof, and, as we held, that person must himself have received the income. His death not only rendered it impossible to assess him, but to assess either any unassessed income received by him or any other person in respect thereof.

Consequently, any theory that, apart from the legislation of 1930, there was some liability to assessment and taxation imposed by law upon income received prior to death which can be relied on to extend the range of the amendments of 1930, is, in my opinion, wholly fallacious. The Act is a new departure. It enables a municipality to impose a tax which could not have been imposed before. To all intents and purposes, so far as the liability to assessment is concerned, the amendments must be read as if the Assessment Act itself had never existed.

The amendments in question are embodied in sec. 3 of the Assessment Amendment Act, 1930, 20 Geo. V. ch. 46. As printed in the statutes for that session, the section is at first sight rather confusing. It comprises in all nine subsections, and the amendments now under consideration are made by subsec. 1, which repeals sec. 12 of the Assessment Act, as passed by the amending Act of 1929, and substitutes therefor two new sections, numbered 12 and 13. The new section 13 embraces six subsections, and it is subsec. 3 thereof which for the first time enables a municipality to assess and tax a legal personal representative in respect of income received by a deceased person. By subsec. 9 of sec. 3 that section is to "be read and construed as having effect on and from the 1st day of January, 1930," except as to any action or litigation then pending.

Subsection 3 of the new sec. 13 provides that "income received by a deceased person in his lifetime shall be liable to assessment and taxation . . . and the executor, administrator or trustee of his estate shall be assessed in respect to such income." And, by virtue of the retroactive provision already mentioned, that change in the law was to be deemed to have taken effect on and from the 1st January, 1930, so that subsec. 3 must be construed as if it read, "On and from the 1st day of January, 1930, income received by a deceased person in his lifetime shall be liable to assessment and taxation . . . and the executor, administrator or trustee of his estate shall be assessed in respect to such income."

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At midnight of the 31st December, 1929, the income which Fudger had received during the year then ended would become the basis for assessing him if he should live until the assessment was completed; but, if he should die before the completion of such assessment, neither his executors nor his estate could, as the law then stood, be assessed in respect thereof. Where is there in subsec. 3 of the new sec. 13 a single word to justify the argument that the new power given to the municipality to assess his executor applies to income received before the amendment came into force? There is nowhere else in the amendments anything to lend colour to that theory, and, as I have already said, there is nothing in the Assessment Act itself to support the argument.

The addition to sec. 21 of the Assessment Act which is enacted by subsec. 2 of sec. 3 of the amending Act might suggest that the words "December 31st then last past," as there used, referred not only to any future December 31st but to any December 31st prior to the 1st January, 1930. If that is what the Legislature meant it is odd that it did not say so. But this provision is clearly intended merely to implement the earlier provision and to indicate the method whereby the returns are to be made for the purpose of giving effect to the liability to assessment which the new section 13 places upon the executor. It cannot, upon any principle of fair statutory interpretation, be strained to throw back the starting point of the new law to a period earlier than January, 1930.

I have come to this conclusion from the mere language of the amendments alone. There is nothing ambiguous about it. From and after the 1st January, 1930, income which, but for the Act could not be made the subject of assessment against an executor, is to be subject to such assessment. What possible opening is there here for the argument that the Act is to have an earlier retroactive operation either as to income or persons? The language is so plain that it is hardly necessary to rely upon the well established principle that Acts of Parliament are not to be construed as having a retroactive or retrospective operation unless that intention is expressed clearly or is a necessary implication from the language used. In the present case the amendments are to operate retrospectively as from the 1st January, 1930. If the argument of the city is sound, then it is difficult to understand why subsec. 9 of sec. 3 was inserted at all. The express limita-

tion of the retroactive operation of the section to the 1st January, 1930, must clearly indicate the date when the new law was to come into operation in all respects both as to persons to be assessed and as to the income upon which such assessment could be based. If there were any doubt that the provisions of subsec. 3 of the new sec. 13 applied wholly to the future, and I have none, the express declaration of the Legislature as to the date from which the Act is to be effective really militates against the city's argument and excludes the implication that the legislation could apply to anything whatever before that date.

This alone is sufficient to dispose of this appeal; but, as the question whether or not the legislation is beyond the power of the Legislature because of the contention that the taxation is indirect is raised by the stated case, it may be expedient to add that I agree with the opinion of my brother Masten upon this point, that the judgment of the Judicial Committee in *City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117, would seem to establish that the tax which is imposed directly upon the executor, administrator or trustee, is none the less a direct tax even though he is taxed in his representative capacity and is entitled to indemnify himself out of the estate. The tax, when once lawfully imposed, having regard to the estate in his hands, is in law and in fact levied against and payable by him personally. The municipality looks to him and not to the estate for payment.

Something was said about the concluding words of subsec. 3 of the new sec. 13. They provide that "income assessed under this subsection shall not be again assessed when the same has been distributed and received by the beneficiaries of the estate." I do not think that these words, meaningless as they clearly are, have any bearing upon the questions raised by this appeal. Just what the draftsman intended by this provision it would be difficult to guess. Income earned or received by a person in his lifetime might, of course, have accumulated in such a way as to be earmarked as unspent cash, or as owing but not yet paid. But, in whatever form it might be, even if collected by his executor as unpaid income earned during the deceased's lifetime, it would necessarily be treated for purposes of administration as capital. It could never pass to a beneficiary as income, and how it could be again assessed against the beneficiary must remain a mystery.

The appeal should be allowed, and the first question sub-

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mitted by the stated case should be answered in the negative and the second question in the affirmative.

The city corporation should pay the costs both here and below incurred by the executor. The executor, having unsuccessfully raised the point which brought the Attorney-General before the Court, should pay his costs.

FISHER, J.A., agreed with ORDE, J.A.

*Appeal allowed.*

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[APPELLATE DIVISION.]

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RE McCAFFERY.

June 12.

*Dependants' Relief—Application to Surrogate Court Judge under Dependants' Relief Act, 1929—Death of Widow after Hearing and before Judgment—Direction to Enter Judgment as of Date of Hearing—Secs. 2(b) and 3(1), (2), of Act—"Future Maintenance"—Allowances Made to Estate of Widow and for two Daughters—Cash-payments and Annuities—Amounts Fixed—Ill-treatment of Dependants by Testator—Terms of Will.*

M. died in April, 1930, having made his will in January, 1930; he left an estate of about \$50,000, 20 per cent. of which was realty. He was survived by his widow, one son, and several daughters and grandchildren. By his will he devised his farm to his son, subject to the condition that the son should not sell it during a period of 20 years next after the testator's death and to the further condition that the son should not permit the testator's daughters C. and M. to enter upon or use the farm. The only provision made for the widow was that his son should support her on the farm or pay her \$275 per year during her life. To his daughter C. he gave \$25 and to his daughter M. \$5. The other issue were reasonably well provided for by the will. The widow and the daughters C. and M. made separate applications to the proper Surrogate Court Judge for an order for relief and adequate maintenance under the Dependants' Relief Act, 1929, 19 Geo. V. ch. 47. Evidence was taken and arguments heard by the Judge on the 28th October, 1930, and judgment was reserved. On the 4th January, 1931, before judgment was given, the widow died. Reasons for judgment were ready on the 3rd January, but not handed to the Registrar until the 5th January, on which day the Registrar notified the parties:—

*Held, following Fawkes v. Swaizie (1899), 31 O.R. 256, that judgment was not pronounced until the 5th January; and an order was afterwards properly made by the Judge directing that his judgment should be entered as of the day of the hearing: McFadden v. McFadden (1918), 42 O.L.R. 599, followed.*

The judgment entered directed certain payments to be made to the three applicants out of the estate of the testator; but the situation was of course changed by the death of the widow:—

*Held*, that the applicants were all "dependants" of the testator within sec. 2(b) of the statute, the two daughters, though over the age of 16, being "through illness or infirmity unable to earn a livelihood." *Held*, also, that "adequate provision" had "not been made for the future maintenance" of these dependants (sec. 3(1)); and that "future" should be read as meaning "after the death of the testator," so as to provide for proper maintenance from and after the death. Under sec. 3(2), the allowance may be an amount payable annually or a lump sum:—

*Held*, upon consideration of the age and health of the applicants, the size of the estate, the position in life of the applicants, and their present needs, that an allowance of \$1,000 to the estate of the widow should be made, out of which her funeral expenses and other liabilities incurred from the time the application was first heard to the date of her death could be paid; that C. should be allowed a lump sum of \$1,000 and an annual payment of \$200 during her natural life; and that M. should receive a lump sum of \$300 and an annuity of \$300.

Lump sums should only be given when periodical payments will seriously embarrass the executors and unduly prolong the distribution and winding-up of the estate.

Reference to *In re Allardice*, *Allardice v. Allardice* (1910), 29 N.Z.L.R. 959, *In re Bell*, *Bell v. Hunter* (1915), 34 N.Z.L.R. 1068, and *Welch v. Mulock*, [1924] N.Z.L.R. 673.

The ill-treatment of these three dependants by the testator was irrelevant and not to be considered by the Court upon the application.

APPEALS by Charles McCaffery, S. Flanagan, and M. Kelly, children and residuary legatees under the will of William McCaffery, deceased, from three orders of the Judge of the Surrogate Court of the County of Perth allowing the claims of Mary McCaffery, widow, and Carrie and Maude McCaffery, daughters, of the testator, under the Dependants' Relief Act, 1929, 19 Geo. V. ch. 47 (Ont.)

The widow died on the 4th January, 1931, and the Surrogate Court Judge's judgment was given to the Registrar on the 5th January, 1931. The learned Judge directed that his judgment be dated and entered as of the 28th October, 1930, the day on which the hearing was completed.

April 16 and 17. The appeals were heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*J. C. Makins*, K.C., for the appellants, argued that, as judgment had not been pronounced until the 5th January, 1931, which was after the death of the widow Mary McCaffery, her claim should be dismissed: *Fawkes v. Swayzie* (1899), 31 O.R. 256. In any event the amount allowed the widow was excessive and beyond what was reasonable, having regard to the moneys she had of her own and having regard to her condition and probable duration of

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App. Div. life. As to the daughters Maude and Carrie, the evidence shewed  
1931. that they were not dependants as contemplated by the Dependants'  
RE Relief Act, 1929; they were able to earn their own living, and at  
McCAFFERY. any rate the amounts awarded them were excessive and unreasonable.

*R. S. Robertson*, K.C., for the respondents, contended that the learned Surrogate Court Judge had the right to date back his judgment to the date of the hearing of the application: *Gunn v. Harper* (1902), 3 O.L.R. 693; *McFadden v. McFadden* (1918), 42 O.L.R. 599. The widow having died, it was admitted that the estate should be relieved from payment of the \$5,000 and the setting apart of the \$10,000. However, \$1,000 should be allowed the widow's estate towards her maintenance from October, 1930, and her debts and funeral expenses. As to the daughters, they were dependants within the meaning of the Act, and the amounts allowed them should be substantially increased.

*W. E. Goodwin*, for the executors and legatees, merely asked the direction of the Court.

June 12. RIDDELL, J.A.:—Appeals from three orders of his Honour Judge Killoran of the Surrogate Court of the County of Perth, which were argued together.

While some of the facts are in my view irrelevant to the matters before us, I think it well to state them somewhat in detail.

The deceased William McCaffery was a farmer of some wealth; in 1902, he was committed to a hospital for the insane, and his wife, Mary, one of the applicants in the Surrogate Court, was made committee; on his release in 1913, he charged his wife with misconduct in the management of the estate; and, though her accounts were regularly passed, he continued to feel resentment against her, manifested, amongst other things, by vile epithets and abuse. After living in the same house with her on his farm on the terms mentioned for some years, he deserted her and the farm, going to live in the city of Stratford—from that time on, he contributed nothing to her support. When leaving the farm, he let it to his son Charles, the son to supply his mother with board and lodging; this he did for about five years, when he was ejected by his father, and went to another farm in the township of Downie—the home-farm was lot 5, con. 4, Ellice—his mother accompanying him and receiving board and lodging as before; Charles also paid the nurse.

This continued until December, 1929, when the wife removed to Stratford, rented a house there at \$20 per month, and continued to live there until her death on the 4th January, 1931. With her went and resided her two daughters, Maude and Carrie, and also a granddaughter, the daughter of her son Charles. She had an investment of \$3,200, which yielded her an income of \$160 per year; but she was up in years, being 79 at the time of her death—she was in bad health, and quite unable to look after herself, and her three descendants cared for her.

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McCaffery, who had in the meantime wholly neglected his wife, died on the 26th April, 1930, having made his will, the previous year in January; he left an estate of some \$50,000, of which practically 20 per cent. was realty. The only provisions for the widow is the following direction to his son Charles, to whom he had left the home-farm (subject to a condition hereinafter to be mentioned):—

"I direct that my said son shall support and maintain my said wife upon the said lands so long as it is agreeable to both of them that she should live there but in case my said son desires that my wife should not continue to live there or in case my wife does not desire to continue to live there then in lieu of the foregoing provision for her support and maintenance I direct that my said son shall pay her the sum of two hundred and seventy-five dollars (\$275) per year during her life the same to be paid quarterly in equal sums.

"6. The foregoing provision for the benefit of my wife shall be in lieu of dower in my lands or any of them."

It may reasonably be conjectured that it was resentment at his daughters Maude and Carrie going with their mother that was the prime mover in his contemptuous bequests to them:—

"I bequeath to my daughter Maudie the sum of five dollars (\$5) and to my daughter Carrie the sum of twenty-five dollars (25)."

He seems to have been determined that they should receive no further benefit out of the property he was leaving behind, as he qualified his devise of the home farm to Charles, as follows:—

"The devise and bequest of the farm lands referred to in the next preceding paragraph to my son Charles McCaffery are subject to the condition that he will not during a period of twenty years next after my death sell or dispose of the lands above set out and

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1931. ownership of the said lands he allows or permits my daughter  
Re Carrie McCaffery or Maudie McCaffery to enter upon or in any  
McCaffery. wise use the said lands that the said lands shall revert to and form  
Riddell, J.A. part of the residue of my estate."

The other issue were reasonably well provided for, including Charles's daughter, who accompanied her grandmother and lived with her.

The widow and the two daughters, Maude and Carrie, made separate applications before his Honour the Judge of the Surrogate Court of the County of Perth "for an order for relief and adequate maintenance under the Dependents' Relief Act," 1929, 19 Geo. V. ch. 47.

The evidence in all three cases was taken and arguments heard on the 28th October, 1930, and judgment was reserved. On the 4th January, 1931, before judgment was given, the widow died. Reasons for judgment were ready on the 3rd January, but were not handed to the Registrar until the 5th January, after the widow's death—the Registrar notified the parties on the 5th January, so that, under such cases as *Fawkes v. Swazie*, 31 O.R. 256, the judgment was not pronounced until the 5th January; on the 26th January, the learned Judge made an order that his judgment should be entered as of the day of the hearing, the 28th October, 1930. On the 3rd February, an order to proceed was taken out by the daughters Maude and Carrie as executrices of their mother's will.

The judgment in favour of the widow directed (1) payment of a lump sum of \$5,000, and (2) the investment of \$10,000, the income of which from the date of the death of McCaffery was to be paid to the widow quarterly for life—this to be in lieu of the provision for her in the will.

The order in favour of Maude, settled on the 14th January, directed the payment to her forthwith of the sum of \$3,000 in lieu of the provision in the will; while that in favour of Carrie directed the payment of certain hospital, medical, nursing, and dental bills to the amount of \$620.75, and also the payment to her forthwith of the sum of \$1,500—these being in lieu of the provisions of the will in her favour.

The three orders are appealed against, all appeals being argued at the same time.

No little was said on the hearing of the manner in which the deceased McCaffery had treated his wife and these daughters; and the learned Judge comments upon the "abominable use" of the wife, the "abominable inhuman manner wholly unjustified" of the treatment of Maude, the "inhuman treatment" of Carrie. All this is *nihil ad rem*; the Court is not a Court of morals or conscience; and we are not dealing with this estate as, in the Civil Law, was done in the case of *testamentum inofficiosum injustum aut nullum*: we are not compelling the testator to do the right thing by his wife and children, the fair thing, the decent thing. The Surrogate Court Judge and we are performing duties—none too easy, be it said—imposed by the Legislature, and that is the sole jurisdiction. The statute must be literally followed and its provisions strictly observed. The statute itself is positive as to the matters to be inquired into and considered by the Judge (sec. 8), and neither he nor we have any concern with anything else.

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Section 3(1) of the statute provides:—

"Where it is made to appear to a judge of the surrogate court of the county or district in which a testator was domiciled at the time of death that such testator has by will so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants or any of them, the judge may make an order charging the whole or any portion of the estate, in such proportion and in such manner as to him may seem proper, with payment of an allowance sufficient to provide such maintenance."

Who are "dependants" for the purposes of the Act is shewn by sec. 2(b), which reads:—

"(b) 'Dependant' shall mean and include the wife or husband of a testator, the child of a testator under the age of sixteen years and the child of a testator over that age who through illness or infirmity is unable to earn a livelihood."

We have to do with the facts only (1) whether the applicant is a "dependant" within the definition in sec. 2(b), and (2) whether "adequate provision has not been made for the future maintenance" of the applicant, being thus a "dependant." The reason, if any, or want of reason, influencing the testator, gross partiality in favour of one child as compared with another, utter disregard of relative claims, etc., etc., are wholly aside from the case. "A man may do what he likes with his own;" but, whether for the protec-

App. Div. tion of the public funds or for any other reason—and with the  
1931. reason for the statute, we have no concern, its terms being clear  
RE and unambiguous—the Legislature has seen fit to direct that the  
McCAFFERY. Judge of the Surrogate Court in the case set out in the statute  
Riddell, J.A. “may make an order charging the . . . estate . . . with  
payment of an allowance sufficient to provide” future maintenance  
for a dependant for whose future maintenance “adequate provi-  
sion has not been made.”

“Future” may, and, as I think, should, be read not as mean-  
ing “after the order” but as “after the death of the testator,” so  
as to provide for the proper maintenance from and after the testa-  
tor’s death.

Were the orders of the learned Surrogate Court Judge based  
even in part on the unreason, inhumanity, brutality, etc., of the  
testator, they could not stand; but he seems to have fully and care-  
fully considered the circumstances of the applicants, which, as I  
have said, are all that should enter into his consideration.

That the learned Judge had power to date his orders back, we  
need not dispute; in a proper case that has been done more than  
once; but the state of affairs, if changed before the actual entering  
up of the order, should, if brought to his attention, be considered  
by him. While a plaintiff is not allowed to place his case higher  
than it was at the teste of the writ, the defendant may take advan-  
tage of subsequent events. The applicant is a quasi-plaintiff;  
and those opposing are practically defendants; they are entitled to  
have the case disposed of upon the facts as they appear when judg-  
ment comes to be given.

A provision in the order that the widow should have the income  
of \$10,000 for life would be unexceptionable, and, indeed, a larger  
income was suggested at the hearing; and, no doubt, there would  
have been no objection to pay to her estate the interest on \$10,000  
at 5 per cent. for the term of her life. For obvious business  
reasons, however, the income should not have been ordered to be  
produced by the withdrawal and separate investment of so large a  
sum; it might conveniently and satisfactorily be provided for by  
a proper investment.

But, in the event which has happened, the order to pay her  
or rather her executors the sum of \$5,000 cannot be supported;  
such a payment would not be for the “future maintenance” of the  
widow at all, but only a sum for her to dispose of in her will.

I think that as to the \$5,000 the appeal succeeds; and, while the provisions in that regard should technically be reduced to the interest at 5 per cent. on \$10,000, adding thereto the payment of her debts, in practice a more convenient manner can be arrived at. Strictly speaking, funeral expenses cannot be called "maintenance," but no one, I think, will object to the estate paying a reasonable sum for that purpose—and all proper ends can be met by directing a lump sum of \$1,000 to be paid her estate.

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Riddeil, J.A.

As to Maude and Carrie, the facts that they cared for their mother, that they thereby incurred the wrath of their father, that they have been good daughters, were badly treated, etc., etc., are not to the point—not the past but the future is to be considered.

They, being over 18 years of age, must, to be considered "dependants," "through illness or infirmity" be "unable to earn a livelihood" (sec. 2(b)). The evidence of the medical man called to support Maude's application is that she is able to earn her living, but that at the time she could not do so as she had to attend to her mother; she had had a breakdown in June, 1930; she was a strong woman before, and, when she got a rest, she would be strong again. In her own evidence we find her saying that she had had a breakdown a week after her father's death, an attack of the "flu," and her health was still "quite broken up yet," though she was caring for her mother; she suffers from neuritis and sciatica and simply couldn't "go out and earn" her living; she was still under the doctor's care, and has never felt strong. With this evidence, while a different conclusion might well have been reached, the findings of the learned Judge cannot be called wholly unreasonable: he thinks that the "applicant, by her 16 years' siege of nursing and caring for her mother, has become, if not wholly, at any rate considerably, unfitted at her age from earning a livelihood."

An order is made for payment to her of \$3,000, to which is added the direction that "to carry out this the devise and legacies of the will, excepting the bequest for Masses, be reduced *pro rata*." This latter provision is exceptionable; the power of the Judge being to charge "the whole or any portion of the estate in such proportion and in such manner as to him seems proper," he should have first exhausted the residuary estate before reducing the special devise and legacies.

But, assuming that this applicant is within the definition of "dependant," I think a lump sum should not be given her, but a

App. Div. sum provided to be paid to her annually. As has been already  
1931. stated, a convenient manner of effecting this is to procure an  
annuity for her of \$300 per annum: she may well be paid a lump  
RE sum of \$300. The appeal should be allowed to the extent stated.  
McCAFFERY.  
Riddell, J.A.

As to Carrie, she swears to an attack of nephritis eight years ago, one of typhoid 16 years ago, and that she was not able to do anything; the medical man swears that "she might do light work but she couldn't do heavy work." If she could get "suitable light work," she might go out and earn a living for herself, "otherwise, no." On this evidence, it was not unreasonable for the learned Judge to find her a "dependant."

The order in this case was for the payment of her medical, surgical, dental, nursing and hospital bills amounting to \$620.75 and a lump sum of \$1,500. She has incurred, too, somewhat large bills in the endeavour to recover her health; and I would allow her a lump sum now of \$1,000, with an annuity of \$200. It does not seem to me that her annual allowance should equal that of her sister; it must be borne in mind that her resources for paying her debts will be considerably increased by the lump sum of \$1,000 ordered to be paid to her. The annuities should be paid, beginning at the day of the testator's death, quarterly.

The executors will, of course, be obliged to defer *pro tanto* the distribution of the estate; but that is inevitable.

In view of the difficulties being caused by the testator himself, the costs here and below of all parties should come out of the estate, those of the executors between solicitor and client.

FISHER, J.A.:—These three appeals under the Dependents' Relief Act, 1929, were argued together. To understand and determine the questions involved, it is necessary to set out some of the facts. William McCaffery, a resident of the city of Stratford, departed this life on the 26th April, 1930, and on application for probate of his will his estate was valued at \$50,972.34. He was survived by his widow, one son Charles, and several daughters and grandchildren. These appeals concern his widow aged 78 and his two daughters, Maude aged 40 and Carrie aged 36, both unmarried.

By para. 4 he gave to his son Charles his farm, "subject to the condition that he will not during a period of 20 years next after my death sell or dispose of the lands above set out and subject further to the condition that if at any time during his ownership

of the said land he allows or permits my daughter Carrie McCaffery or Maude McCaffery to enter upon or in anywise use the said lands the said lands shall revert to and form part of my residuary estate."

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Fisher, J.A.

This paragraph indicates the testator's animosity towards his daughters Maude and Carrie, due, it is alleged, to the fact that they protected their mother from his threats and insults.

The only provision made for the widow (in lieu of dower) is contained in para. 5, which reads:—

"I direct that my said son shall support and maintain my said wife upon the said lands so long as it is agreeable to both of them that she should live there but in case my said son desires that my wife should not continue to live there or in case my wife does not desire to continue to live there then in lieu of the foregoing provision for her support and maintenance I direct that my said son shall pay her the sum of two hundred and seventy-five dollars (\$275) per year during her life the same to be paid quarterly in equal sums."

Many years before he died, the husband left his wife and resided alone in Stratford.

To his daughter Maude he gave \$5 and to his daughter Carrie \$25.

The widow and these two daughters invoked the aid of the Dependants' Relief Act, and their applications were heard by his Honour Judge James L. Killoran, Judge of the Surrogate Court of the County of Perth.

Counsel for all parties interested appeared before the learned Judge, and, after the hearing of many witnesses, judgment was reserved on the 28th October, 1930. Subsequently judgment was delivered on the 3rd January, 1931, handed to the Registrar on the 5th, and on that day the Registrar notified all parties.

Mary, the widow, died on the 4th January, 1931.

Following *McFadden v. McFadden*, 42 O.L.R. 599, the learned Judge directed that judgment be dated and entered as of the 28th October, 1930.

As to the widow's claim for relief, the Judge was of the opinion that \$1,800 per year was a proper sum to be allowed as a yearly maintenance, and in addition he directed that this applicant receive from the estate \$5,000 forthwith and that \$10,000 should be segregated and set aside and invested by the executors and the

App. Div. income therefrom paid quarterly, and upon the death of the widow  
1931. the \$10,000 was to revert to the estate.

RE As to Maude, the Judge made the following finding:—  
McCAFFERY. “Taking the above evidence and the evidence as a whole, I  
Fisher, J.A. think it is a fair conclusion that the applicant, by her 16 years’  
siege of nursing and caring for her mother, has become, if not  
wholly, at any rate considerably, unfitted at her age from earning  
a livelihood, and that the evidence established that she requires  
for her living at least \$700 per year.”

And he ordered the payment to her out of the estate of the sum  
of \$3,000.

As to Carrie, the Judge’s findings are as follows:—

“I think the evidence on the whole shews this applicant is, if  
not wholly, at least partially, unfitted for earning a livelihood.”

And he ordered payment to her out of the estate by the execu-  
tors of unpaid bills, for hospital, doctors, nurses, and other  
expenses, amounting to \$625.75, and the payment of a lump sum  
of \$1,500.

It was admitted on the argument—the widow having died—  
that the estate was relieved from payment of the sum of \$5,000 and  
the segregation of the \$10,000.

Mr. Robertson argued that a lump sum of \$1,000 should be  
allowed and paid to the widow’s estate towards her keep from  
October, 1930, her outstanding accounts and her funeral expenses,  
and also that the sums allowed to Maude and Carrie should be  
substantially increased.

The questions for determination are:—

(a) Do the findings justify and was the learned Judge right in  
granting relief in these cases?

(b) What is the need of maintenance and support?

(c) Was the Judge right in granting Maude and Carrie a lump  
sum instead of periodical payments?

The evidence is convincing that the testator did not discharge  
his moral duty towards these two daughters.

In the case of Maude, she nursed and protected her mother for  
upwards of sixteen years, and during that time suffered from in-  
flammatory rheumatism and pleurisy, and had pneumonia on three  
different occasions; her health is broken and she is now suffering  
from neuritis in one limb and sciatica in the other.

As to Carrie, apart from a period of about 2½ years when she was away from home, the evidence is that she, too, assisted in nursing and caring for her invalid mother; had typhoid fever in 1914, Bright's disease in 1922, an operation for appendicitis in 1927, and in 1930 had a serious operation.

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My opinion is that the learned Judge was fully justified in finding that Maude and Carrie came within the provisions of the Act and are entitled to relief.

To determine what relief, and the form it should take in all cases arising under the Act, the object and purposes of the Act should be carefully considered, and to that end I desire to refer to the observations of Edwards, J., in the case of *In re Allardice, Allardice v. Allardice* (1910), 29 N.Z.L.R. 959, affirmed by the Privy Council, [1911] A.C. 730. That was a decision under the New Zealand statute, and our statute is almost identical in terms. Edwards, J., at pp. 972, 973, said:—

"It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient but no more than sufficient to repair it."

As to whether a periodical allowance should be made or a lump sum, see the observations of Sim, J., in *In re Bell, Bell v. Hunter* (1915), 34 N.Z.L.R. 1068, wherein he stated (p. 1070):—

"The tendency in recent cases is to avoid granting a lump sum and to administer relief by periodical payments. The object of the Act is that the person entitled to relief shall be properly maintained, and this can best be done by periodical payments."

Under subsec. 2 of sec. 3 of the Act, "the allowance may be by way of an amount payable annually or of a lump sum to be paid."

In dealing with the quantum of relief, and whether a court should grant a lump sum instead of periodical payments, many difficulties arise. To grant a lump sum may be advantageous in some cases, as it would enable the executors to go on and adminis-

App. Div. 1931. ter and wind up the estate, instead of holding it up for years for final distribution; and, on the other hand, the recipients of a lump sum may die within a short time, or their circumstances may change by their marriage or by coming into possession of sufficient property out of which they can be properly maintained.

RE McCaffery. Fisher, J.A. It would appear from sec. 3(1) that "future maintenance" is aimed at, and that, as the object and purpose of the Act was to protect dependants who are entitled to relief, and have been neglected by the testator, the judge before whom applications come on for hearing in the first instance, and to whom the Act has given a wide discretion, should, as far as practicable—depending of course on all the circumstances of each case—grant periodical payments instead of a lump sum, and that lump sums should only be given when periodical payments will seriously embarrass the executors and unduly prolong the distribution and winding-up of the estate.

As to what sums should be allowed in this case consideration should be given to the age, health, size of the estate, the position in life of the claimants, and their present needs.

There does not appear to be any provision in our Act for the making of a suspensory order, and therefore all that the Court can do is to make a final one. That a final order only could be made was decided in *Welch v. Mulock*, [1924] N.Z.L.R. 673.

In the present cases before us, if lump sums are given, the estate can be wound up expeditiously, and on the other hand if capital is to be segregated and invested, it may be for a long period of time—depending, of course, upon how long these two daughters live—as only a portion of the estate can be distributed and a final distribution made when the daughters have departed this life. Having regard to the fact that there is a distributable estate of about \$45,000, and that these dependants are in poor health—largely due to the care and nervous strain of many years' standing in looking after their mother—their earning power—particularly that of Maude—is negligible.

Carrie owes, at the present time, for hospital, doctors, nurses, etc., \$625.75, and she will require assistance before any moneys are payable out of capital to be invested, and to which I shall presently refer, and I think a \$1,000 cash payment would be a reasonable sum to allow her, and for the same reason Maude should receive a cash payment of \$300.

I can see no objection to an allowance to the estate of the mother of \$1,000, out of which her funeral expenses and other liabilities incurred from the time this application was first heard in October to the date of her death can be paid.

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Fisher, J.A.

My brother Masten on the argument suggested that annuities might be more satisfactory than granting periodical payments under the guidance of executors, as that mode of payment would safeguard dependants from any possible loss of their moneys during their lifetime, and I would readily agree with that suggestion were it not for the fact that the dependants might die soon after the annuities were purchased, and in that event there would be no return to the estate of the capital required for the purchase of the annuities. I think, under all the circumstances, the proper order to make, in addition to the payments above referred to, is that the executors shall appropriate out of the capital of the estate a sufficient sum—to be invested by the executors in securities authorised by our statute—that will yield in the case of Maude the sum of \$300 per year, and in the case of Carrie that will yield the sum of \$200, and that each of these sums shall be paid to these two dependants during their natural lifetime to commence from the date of the testator's death—income to be paid quarterly.

I observe that the learned trial Judge in his reasons more than once referred to the abuse and inhuman treatment by the testator of his wife and these two daughters. Whether that influenced him in the conclusions he arrived at I do not know, but I think it well to point out that the Court on these applications cannot enter into the merits of the differences and the treatment suffered by the dependants at the hands of the testator—these are irrelevant matters—as the important thing to determine, as already pointed out, is, has the testator ignored the dependants or failed in his moral duty to provide for them, and on this point *Welch v. Mulock, supra*, may be referred to.

The judgment of the trial Judge will be varied and judgment entered in accordance with these findings.

Costs of all parties—those of the executor as between solicitor and client—to be taxed and paid out of the estate.

LATCHFORD, C.J., and MASTEN and ORDE, JJ.A., agreed with FISHER, J.A.

*Order as stated by FISHER, J.A.*

## [APPELLATE DIVISION.]

1931.

AUSTIN V. JORDAN.

June 12.

*Insurance (Automobile)—Indemnity against Damage Caused by Accidental Collision with another Object or by Upset—Collision with Shoulder of Bridge—"Object"—Liability of Insurer.*

An insurance company, made a third party in this action, agreed by a policy of insurance to indemnify the defendant against direct loss or damage to his motor-vehicle, "if caused solely by accidental collision with another object either moving or stationary or by upset." As the defendant's motor-vehicle was proceeding along a highway, it crossed a bridge forming part of the highway. There was a soft spot in the road into which the front wheels of the vehicle sank as it crossed the bridge. The hole was so deep that the bottom of the vehicle struck the shoulder of the bridge and the vehicle was injured:—

*Held*, that the shoulder of the bridge was an "object" within the meaning of the policy, and that the third party was liable to the defendant thereunder.

*London Guarantee and Accident Co. v. Sowards*, [1923] S.C.R. 365, distinguished.

Per RIDDELL and ORDE, J.J.A., dissenting:—The portion of the road with which there was an "accidental collision" was not "another object" within the meaning of the policy, as was expressly decided in the *Sowards* case. An "upset" was an additional eventuality, not covered by the previous words, and the addition of those words in the policy after the words "collision with another object" did not make a difference in favour of the defendant against the third party.

AN appeal by the Motor Union Insurance Company Ltd., brought in as a third party, from the judgment of DENTON, Co. C.J., in an action in the County Court of the County of York, holding the appellant company liable to indemnify the defendant in respect of the amount of the judgment recovered by the plaintiff against the defendant for repairs made to the defendant's motor-car.

April 17. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

A. C. Heighington, K.C., for the appellant company, argued that, on the facts as found by the learned trial Judge, the defendant had no claim under the insurance policy in question against the third party. The portion of the road with which there was "an accidental collision" was not "another object" within the meaning of the policy. *London Guarantee and Accident Co. v. Sowards*, [1923] S.C.R. 365, is directly in point and governs this case.

O. M. Walsh, for the defendant, respondent, contended that the words in the policy under discussion in the present case were

essentially different from those in the *Sowards* case. The shoulder of the bridge, which was the obstacle with which the bottom of the automobile in the present case came in contact, was an "object" within the meaning of the policy in question here.

App. Div.

1931.

AUSTIN

v.

JORDAN.

June 12. RIDDELL, J.A.:—The plaintiff brought this action against the defendant for the price of certain work done for him in repairing, etc., a motor-car; the defendant disputed the claim, and added, as a third party, the Motor Union Insurance Company Ltd., the present appellant, claiming insurance of the car whose repair was the cause of action. No question is raised before us by any one as to the regularity of such third party process in this case.

The facts are that the appellant by its policy of insurance agreed to "indemnify the insured (the defendant) against direct loss or damage to the automobile, including its equipment . . . if caused solely by accidental collision with another object either moving or stationary or by upset." The defendant was, on the 29th June, 1930, going from Sudbury to Nairn Centre; there had been rains for a number of days previously, and the road was "greasy and muddy, absolutely unfit for traffic . . . a provincial highway, gravelled . . . Passing over a culvert on a level with the rest of the road, on getting across, "the front end of the automobile appeared to drop down, sink into the ground . . . the automobile dropped at the front end, and the wheels appeared to sink into the ground, and there was a sudden jar." The defendant proceeded, however, till he was stopped by a flood on the road; and, on returning to a filling station, he became aware of damage to his car from the previous occurrence. (I have employed the exact language of the defendant, describing the facts upon which he bases his claim against the company).

The learned trial Judge, his Honour Judge Denton, in the County Court of the County of York, gave judgment for the plaintiff against the defendant for \$425 and costs—this is not and cannot be objected to. He also held the defendant entitled to relief over against the company; it is this that is the sole subject of the appeal.

With great respect, I cannot agree; I am of opinion that the much canvassed case of *London Guarantee and Accident Co. v. Sowards*, [1923] S.C.R. 365, reversing the Appellate Division and reinstating the trial judgment, *Sowards v. London Guarantee and*

App. Div. *Accident Co.* (1922), 52 O.L.R. 39, wholly governs the interpretation of this policy, and that the portion of the road with which there was an "accidental collision" was not "another object" within the meaning of the policy. It was so expressly decided in the case mentioned in respect of the policy there in question; and the addition of the words "or by upset," which the learned trial Judge considers to make a difference in favour of the insured, seems to me to bear the other way—if the "object" with which the car was to come into collision could be the earth, there would be no need of employing these words at all. It seems plain that an "upset" was an additional eventuality, not covered by the previous words; in other words, there were two eventualities in contemplation to be provided for, viz., (1) collision with another object, and (2) upset; and that, had the latter words not been added, a collision with the earth by upset would not have been covered—in other words, the earth is not an "object" within the meaning of the policy.

It is argued that the decision in the case cited proceeded upon the *noscitur à sociis* or *ejusdem generis* principle; were the trial judgment only to be considered, there would be some foundation for this argument; but it will be seen that the majority of the Judges in the Supreme Court did not take that as a basis of their decision.

I think the appeal must succeed, the third party judgment be set aside, and judgment be entered for the third party with costs here and below.

ORDE, J.A., agreed with RIDDELL, J.A.

MASTEN, J.A.:—This was an appeal by the third party from the judgment pronounced herein on the 18th February, 1931, by Judge Denton, in so far as that judgment holds the third party liable to the defendant for the amount of the plaintiff's judgment.

The facts are stated in the judgment of Judge Denton and in that which has been prepared by my brother Riddell, and need not be here repeated.

I would dismiss this appeal, and my reasons may be very briefly and simply stated.

The words of the policy here in question differ essentially from the words of the policy which was construed in *London Guarantee and Accident Co. v. Sowards*, [1923] S.C.R. 365. In that case,

the risk insured against was the risk of loss "by being in accidental collision with any other automobile, vehicle or object." It was held that injury resulting from coming into contact with the earth after striking a rut in the road and upsetting did not arise from "collision" within the meaning of that term in the policy.

In the present case, the words are "the insurer agrees to indemnify the insured against direct loss or damage to the automobile . . . if caused solely by accidental collision with another object either moving or stationary or by upset."

The facts in the present case, as I understand them, are that, as the automobile was proceeding along the highway, it crossed a small cement bridge forming part of the highway. At the further side of this cement bridge, there appears to have been a soft spot in the road into which the front wheels of the automobile sank as it crossed the cement bridge. The hole was so deep that the bottom of the automobile, amidsthips, struck the shoulder of the cement bridge and injury to the automobile resulted.

I think that the shoulder of the bridge is an "object" within the meaning of the policy here in question and was intended by the parties to be covered; also, that the difference in the language of the two policies, coupled with the difference in the circumstances giving rise to the accident, are such that this case is distinguishable from the *Sowards* case.

For this reason I would dismiss the appeal with costs.

LATCHFORD, C.J., and FISHER, J.A., agreed with MASTEN, J.A.

*Appeal dismissed* (RIDDELL and ORDE, J.J.A., *dissenting.*)

[A motion by the insurance company for leave to appeal to the Supreme Court of Canada was refused.]

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[APPELLATE DIVISION.]

KADISHEWITZ V. LAURENTIAN INSURANCE CO.

1930.

*Insurance (Fire)—Failure of Assured to Disclose Material Facts—Absence of Proof that Omissions Fraudulent—No Right to Rescind—Insurance Act, R.S.O. 1927, ch. 222, sec. 98, condition 1.*

Oct. 11.

1931.

In an action upon a fire insurance policy the defences were that when applying for the insurance the plaintiff failed to disclose certain material facts and that no valid contract of insurance ever became binding on the defendant company. The non-disclosure alleged was admittedly not fraudulent:—

June 12.

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1931.

AUSTIN

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JORDAN.

MASTEN, J.A.

1930-31. *Held*, that the defendant company was not entitled to rescind the contract, and the counterclaim for rescission was properly dismissed by the trial Judge.  
KADIS-HEWITZ v. LAURENTIAN INSURANCE Co.  
Statutory condition 1, sec. 98 of the Insurance Act, considered.  
Review of the authorities.

AN action to recover from the defendant company \$1,863.80 upon a policy of fire insurance upon chattels, issued by the defendant company on the 11th November, 1926.

The action was tried before McEvoy, J., without a jury, at a Toronto sittings.

*H. J. Macdonald* and *J. L. Cohen*, for the plaintiff.

*T. N. Phelan*, K.C., and *N. Phillips*, K.C., for the defendant company.

October 11, 1930. McEvoy, J.:—This is an action brought by the plaintiff, Rosie Kadishewitz, against the Laurentian Insurance Company to collect the sum of \$1,863.80, being the claim for loss sustained by her upon premises insured against fire loss by the defendant company under its policy number 14973. The policy was issued on the 11th November, 1926; the premium was paid; there was no written application for insurance. There was a meeting between the insured and an insurance broker, and as a result the insurance broker correctly described the physical assets which were to be the subject-matter of the insurance contract. The broker brought the risk into the office of the defendant company, and, I assume, recommended the risk to it, and without any questions the defendant company accepted the risk and issued the policy. A fire occurred on the 3rd March, 1929, and the property insured was damaged to the amount of \$1,863.80, being the amount arrived at by adjusters acting upon behalf of the defendant company on the one hand and of the plaintiff on the other. The quantum of the damage suffered was not in dispute at the trial.

The defendant company resists liability to pay, upon the ground that the plaintiff made application for the policy of insurance and at the time of making such application fraudulently concealed from the defendant company certain material facts which, if they had been communicated to it, would have influenced it in refusing the application, and the defendant company would have refused to enter into a contract of insurance with the plaintiff.

The defendant company sets out then the following allegations:—

(a) That the plaintiff had suffered a previous loss by fire.

McEvoy, J.

(b) That the plaintiff had been convicted of a breach of the provincial liquor laws.

1930.

(c) That the husband of the plaintiff had been convicted of robbery and served a term in the penitentiary.

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HEWITZ  
v.

(d) That a fire insurance policy issued by an insurance company other than the defendant was cancelled before its expiration.

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INSURANCE  
Co.

(e) That the plaintiff had enemies and that there was danger of incendiarism.

(f) That the plaintiff served a term in gaol.

(g) That the plaintiff was engaged in the business of a bootlegger on the premises containing the goods and chattels insured.

The defendant company contends that it was the duty of the plaintiff to disclose to the defendant the facts set out above, and that the concealment of, or failure to disclose, the facts set out avoids the policy of insurance sued upon. The defendant repeats the allegations above set out, and says that the plaintiff's claim is subject to the following condition: "If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made;" and the defendant company alleges that the policy is void.

The defendant company further alleges that after the policy of insurance was issued the plaintiff was engaged in the business of a bootlegger on the premises on which the goods and chattels were situate, and that the conducting of the said business constituted a change material to the risk and the policy was for that reason void; and the defendant company alleged that the policy of insurance claimed under was subject to the condition that any fraud or wilfully false statement in a statutory declaration would vitiate the policy, and that the policy is therefore vitiated.

Upon the evidence I find the facts to be: the plaintiff did not make any false allegation in the proofs of loss which could work a vitiation of the policy; the plaintiff had, a few months before the application was given to the insurance broker for the insurance effected under the policy sued upon, had the premises insured and had had a fire in the insured premises, and the insurance company

McEvoy, J. which paid the loss on account of that fire cancelled the policy  
1930. of insurance held by the plaintiff, and the plaintiff did not make  
KADIS- this fact known to the defendant company nor to the broker who  
HEWITZ procured the plaintiff's insurance for her, and there is no evi-  
v. dence that either the plaintiff or the broker who procured the  
LAURENTIAN insurance for her was ever asked about this matter; the plaintiff  
INSURANCE Co. was fined for a breach of the Liquor Act, and she was subsequently  
convicted of selling liquor contrary to the Liquor Act, and served  
a three months' sentence of imprisonment, and there is no evi-  
dence to indicate that the plaintiff carried on the business of a  
bootlegger in the insured premises beyond the fact that the plain-  
tiff was fined and convicted as above mentioned, and the plaintiff  
did not make known to the defendant the fact that she had been  
fined for a breach of the Liquor Act, nor that she had been con-  
victed of selling and imprisoned for selling; the plaintiff's husband  
had been convicted, as alleged, and served a term in the peniten-  
tiary, and the plaintiff did not make this fact known to the insur-  
ance broker who procured the insurance for her, nor did the broker  
make this fact known to the defendant company before the policy  
was issued; the plaintiff in her examination for discovery said in  
effect that she believed that enemies had encompassed the wrong-  
ful conviction of her husband upon a criminal charge of burglary  
and had wrongfully caused him to be imprisoned in the peniten-  
tiary, and that the husband at any rate had enemies; this fact  
was not communicated to the defendant company before the policy  
in question was issued.

The submission of the defendant company was that it was the  
duty of the plaintiff to give to the company which was asked to  
undertake the insurance notice of each one of these facts; that  
each one of these facts was a material matter which it was neces-  
sary for the company to know to enable it to pass upon the desir-  
ability of undertaking the insurance offered; and that the failure  
of the plaintiff to make known these matters material to the risk  
was such a failure as prevented the negotiations that occurred be-  
tween the parties ever ripening into a contract of insurance at all.  
The submission, as I understand it, was that there was present in  
the facts existent at the time of the negotiations and at the time  
of the intended making of the contract such a set of facts as made  
it impossible in law that an actual contract of insurance could  
be made. The defendant company's position, as I understand it,

may be (within certain limitations) illustrated by an example. Suppose a man and woman by entirely proper and legal forms of procedure are married, they live together as man and wife for nearly three years, and at the end of that time it is discovered, and indisputably established, that the man and the woman are sister and brother. Notwithstanding that both parties intended to marry, and believed that they had married, yet in law there was no marriage. So, it is said in this case, that on account of the failure of the plaintiff to make known to the defendant the facts which, admittedly, she had failed to make known to it, there was not, and could not in law be, a contract of insurance.

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Authorities were cited and relied upon to shew that in an insurance contract the duty is cast upon the person seeking the insurance to act in the greatest good faith and to reveal to the insurer material facts to enable the insurer to appreciate the nature and quality of the risk.

I am of opinion that at least some of the matters which have been found to exist at the time of the application were matters which, if the defendant company before taking the insurance had seen fit to inquire about and if on inquiry the plaintiff had misled the defendant company by any act or omission to believe the facts were otherwise than in reality they were, would under our law relieve the defendant company of liability.

In the view I take of this case it is not necessary for me to determine whether each and every one of the facts alleged to be material and concealed are material and concealed or not. If any one of them or any combination of one or more of them is material and concealed, the result is the same. This view of the law contended for contemplates that every person who desires to have his dwelling house insured must know—and that it is at his risk that he does know—everything which might be considered material to reveal to an insurance company about to enter into an insurance contract, and if he fails to make the revelation the insurance policy is void.

The submission of the defendant company is that there was never any contract of insurance in this case in existence and that for that reason the Insurance Act and the statutory conditions provided for in the Act and appearing in the policy are not in question in this action at all. The argument is ingenious and forceful, but I am not able to accept it, and I am not able to accept

McEvoy, J. any other of the defences raised formally, none of which was seriously pressed.

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I am therefore of opinion that there should be judgment for the plaintiff for the amount claimed, with costs.

The defendant company appealed from the judgment of McEvoy, J.

April 29. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

T. N. Phelan, K.C., for the appellant company, argued for rescission of the contract of insurance on the ground of non-disclosure of material facts. Reliance was not placed upon the statutory conditions, but upon the equitable jurisdiction of the Court. Reference to Porter's Laws of Insurance, 7th ed., p. 161; 6 C.E.D. (Ont.) 226; *London Guarantee and Accident Co. v. Green* (1930), 38 O.W.N. 398; *Fraser v. Payne and Clements* (1926), 58 O.L.R. 361; *Re Yager and Guardian Assurance Co.* (1912), 108 L.T.R. 38; *Barbour v. Alliance Assurance Co.* (1927), 32 O.W.N. 86; *London Assurance v. Mansel* (1879), 11 Ch. D. 363; *Regina v. Commissioners of Taxes for Barstaple Division of Essex*, [1895] 2 Q.B. 123.

R. S. Robertson, K.C., and J. L. Cohen, for the plaintiff, respondent, contended that under statutory condition 1 it was necessary to shew that the concealment or non-disclosure of material facts was fraudulent in order to void the policy: *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K.B. 863.

Phelan, K.C., in reply, admitted that if he had to prove fraudulent concealment or fraudulent non-disclosure, he failed, but he contended he had not to prove this. Reference to *S. Pearson & Son Ltd. v. Dublin Corporation*, [1907] A.C. 351; Halsbury's Laws of England, vol. 20, p. 728; *Morin v. Anger* (1930), 66 O.L.R. 327.

June 12. LATCHFORD, C.J.:—This appeal is from the judgment of McEvoy, J., of the 11th October, 1930, awarding the plaintiff \$1,996 and costs.

The action was based on a policy of insurance for \$2,000 issued by the defendant company and dated the 11th November, 1926. A fire took place in the insured premises on the 3rd March, 1929, and the plaintiff sustained a loss which was adjusted at \$1,863.80—

with interest on the amount of the judgment. The amount of the loss was not disputed at the trial.

The grounds of the appeal are: (a) that when applying for the insurance the plaintiff failed to disclose certain material facts specified in the statement of defence; and (b) that no valid contract of insurance became binding on the defendant.

All the facts referred to are mentioned in the reasons for judgment and need not be repeated.

The defence that the policy was void from the beginning, owing to the non-disclosure of such facts, is, in my opinion, untenable, as was held in the Court below.

It was not proved that the omissions were fraudulent. Accordingly, under the Insurance Act, R.S.O. 1927, ch. 222, sec. 98, statutory condition 1, the policy was not void, but was a valid and subsisting contract binding on the defendant when the loss occurred.

The numerous cases cited by Mr. Phelan refer to the law as it existed prior to the enactment of the Ontario statute and have no application to the present case.

The appeal should be dismissed with costs.

RIDDELL, J.A.:—This is an action upon a policy of fire insurance in which the trial Judge gave judgment in favour of the plaintiff. The defendant company appeals.

It is to be said at once that the only question is as to the validity of the policy. The defendant pleads that it is void by reason of the fraudulent concealment by the applicant for the insurance of certain material facts, which are set out in the statement of defence. At the trial, however, there was no attempt to prove that the concealment, such as it may have been, was fraudulent, and before us counsel candidly admitted that, if it was necessary to his defence that the concealment should be fraudulent, he had no ground of complaint.

Without deciding as to the materiality of the alleged concealment, as to which I express no opinion, I proceed to examine the law governing the case. Our statute, R.S.O. 1927, ch. 222, sec. 98(1), provides:—

“The conditions set forth in this section shall be deemed to be part of every contract in force in Ontario, except contracts where the subject-matter of the insurance is exclusively rents,

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charges or loss of profits, and shall be printed on every policy with the heading 'Statutory Conditions,' and, subject to the provisions of section 102, no variation, omission or addition thereto shall be binding on the insured."

One of these conditions reads thus:—

"Misrepresentation. 1. If any person applying for insurance falsely describes the property to the prejudice of the insurer; or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made."

Irrespective of statutory provision, there is no doubt that a contract of insurance may be voided for non-disclosure of material facts, however innocent it may be—non-disclosure of material facts, that is of facts that a reasonable man should consider material, even though without fraud, furnishes a defence against enforcement of the contract under a plea of *Non est factum* and at the Common Law, and in Equity is a sufficient ground for rescission.

The argument of the company is that, notwithstanding the statutory provision mentioned, the previous right of resistance to the enforcement of the contract at the Common Law and the equitable right of rescission continue.

The maxim *Expressio unius est exclusio alterius*, or, as it is sometimes stated, *Expressum facit cessare tacitum*, is thus defined by Coleridge, J., in *Regina v. Eastern Archipelago Co.* (1853), 1 E. & B. 310, at p. 343: "I apprehend it to be a rule, as universal as it is wise, that, where a written instrument contains a specific provision as to a particular subject-matter, the provision as to that matter, which the law would imply if the instrument were silent, cannot be resorted to."

There is, indeed, an exception to this rule, expressed by Willes, J., in *Mody v. Gregson* (1868), L.R. 4 Ex. 49, at p. 53, thus: "The doctrine that an express provision excludes implication (*expressum facit cessare tacitum*) does not affect cases in which the express provision appears, upon the true construction of the contract, to have been superadded for the benefit" (of the person in whose favour it is inserted). Cockburn, C.J., in *Bigge v. Parkinson* (1862), 7 H. & N. 955, at p. 961, has much the same language.

Perhaps the most illuminating judgments are to be found in *Regina v. Eastern Archipelago Co.*, 1 E. & B. 310, 2 E. & B. 856. The charter of the company provided that in certain events, which actually happened, it should be lawful for the "Queen by any writing under the great seal or under the sign manual" to revoke the charter "either absolutely, or under such terms or conditions" as the Queen should think fit. On *sci. fa.* brought, and judgment given for the plaintiff, on a rule to arrest the judgment on the ground that the declaration did not shew that the Queen had by writing under the great seal or sign manual revoked the charter, the Court of Queen's Bench equally divided in opinion—Erle and Coleridge, JJ., holding that the express provision for revocation in a particular way superseded the implied power of revocation, while Lord Campbell, C.J., and Wightman, J., held the contrary. Wightman, J., at p. 330 *ad fin.*, gives the *ratio decidendi* in these words: "This gives to the Crown an additional power, which it would not have had if it had been left to the remedy by *scire facias* only; for it gives the power of *qualified revocation*, to which the proceeding by *scire facias* is inapplicable." In the Exchequer Chamber the opinion of Campbell and Wightman prevailed, but again on the ground of an additional power being given by the express condition. I pass over the judgment of Parke, B., who fully agrees with Erle and Coleridge, JJ., in the Queen's Bench, as also that of Martin, B., who was inclined to agree; and for the most part quote from the adverse judgments only. Williams, J., at p. 879, says: "If the intention of the proviso were to give a remedy in addition to that by way of *scire facias*, it is plain that the maxim would be inapplicable . . . ;" and, p. 880, "I think it justifiable to believe that the real intention was that the act of revocation by the Queen should operate as an additional remedy." Platt, B., at p. 884, says: "The context shews that the power and remedies reserved by that proviso, if they were capable of being exercised and enforced, were cumulative:" and at p. 885: "Both provisos were conceived with a similar design, and were introduced, not with a view of abridging the rights of the Crown, but to reserve to the Crown a more extensive and summary control over the company." Cresswell, J., at p. 891: "It would indeed give the Queen a new power to revoke which neither she nor the subject would have enjoyed by the Common Law."

Parke, B., did not agree with the majority, because he thought.

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App. Div. "that the clause in question is inoperative if treated as giving an  
 1931. additional remedy" (p. 901); or, as he elsewhere says, "as an  
 KADIS- additional and cumulative remedy this condition of the charter  
 HEWITZ would be valueless, and might be struck out of the charter alto-  
 v. together" (p. 900). Pollock, C.B., says: "I think the proviso is  
 LAURENTIAN to be considered as a further and additional power to the Crown  
 INSURANCE to revoke the charter in a particular manner" (p. 907), "a cumu-  
 Co. lative remedy . . . " (p. 906). Jervis, C.J., says: "The  
 Riddell, J.A. proviso . . . was intended . . . to give a cumulative and  
 additional remedy to the Crown . . . a cumulative or addi-  
 tional remedy" (p. 911).

In the present case, it would be the height of absurdity to suppose that the Legislature, in making the condition mentioned a part of the policy of insurance, meant to give the insurer an additional or cumulative right along with the Common Law and Equity rights he had of voiding the policy for an innocent omission to disclose material facts—it is perfectly plain, on the contrary, that what was intended was to limit these existing rights by requiring the omission to be fraudulent.

The maxim applies and the rights are limited accordingly—of course, there is no difference in principle between the right to take a certain procedure rather than another, which was in question in the *Eastern Archipelago* case, and any other right, e.g., the right to void an insurance policy.

Irrespective of the provision in sec. 98 against any variation in the conditions of the policy, I am of opinion that the right of the company to void the policy depends—in this regard—upon the non-disclosure being fraudulent.

The appeal should be dismissed with costs.

While it now becomes immaterial in the present case, no countenance can be given to the proposition that the insurance company could have rescission without repayment of the premiums.

MASTEN, J.A.:—This was an appeal by the defendant from a judgment of McEvoy, J., dated the 11th October, 1930, whereby the plaintiff recovered against the defendant company the sum of \$1,996.

The action is brought upon a policy of fire insurance containing the usual statutory provision number 1, as follows:—

"If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made."

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There is no variation of this statutory condition contained in the policy. Masten, J.A.

The question on this appeal arises under the counterclaim of the defendant company asking rescission of the alleged contract of insurance on grounds of non-disclosure by the plaintiff. The defendant company admits that under the circumstances disclosed in the evidence there was no fraudulent misrepresentation by the plaintiff, but alleges the following material circumstances as being known to the plaintiff, which, under the doctrine of *uberimæ fidei*, should have been disclosed to the defendant company by the plaintiff when applying for this insurance:—

(a) That the plaintiff had suffered a previous loss by fire.

(b) That the plaintiff had been convicted of a breach of the provincial liquor laws.

(c) That the husband of the plaintiff had been convicted of robbery and served a term in the penitentiary.

(d) That a fire insurance policy issued by an insurance company other than the defendant was cancelled before its expiration.

(e) That the plaintiff had enemies and that there was danger of incendiarism.

(f) That the plaintiff served a term in gaol.

(g) That the plaintiff was engaged in the business of a bootlegger on the premises containing the goods and chattels insured.

Counsel for the defendant company frankly admitted on the argument that, if compelled to depend upon fraudulent misrepresentation, he could not succeed, and the sole question now before us for consideration is whether under these circumstances the right of rescission inheres in the defendant company notwithstanding statutory condition number 1, above quoted.

I am of opinion that the defendant company cannot maintain this counterclaim and that it would be demurrable in law.

The nature of an action for rescission, which formerly came

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under the exclusive jurisdiction of the Court of Chancery, is thus set forth in Story on Equity, 3rd English edition, para. 694:—

“In the first place, then, let us consider in what cases the court will direct the Delivery up, Cancellation, or Rescission of agreements, securities, deeds, or other instruments. It is obvious that the jurisdiction, exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. If, therefore, the instrument was void for matter apparent upon the face of it, there was no call to exercise the jurisdiction, with the possible exception of instruments forming a cloud upon the title to land. The party is relieved upon the principle, as it is technically called *quia timet*; that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest.”

The contract forming the foundation of this action—if it can be attacked at all on the lines set forth by the defendant—was a contract voidable and not void; it remained in force until the fire happened, and when the fire happened the only action that lay was an action for the recovery of the amount of loss covered by the policy. To this the only defence was the defence afforded by the policy itself; it was then too late to bring an action for rescission based upon the principle of *quia timet*. Apart, however, from that, and considering the provision of the Insurance Act in condition number 1, above quoted, I think that the effect of the statute is to abolish the defence arising out of innocent non-disclosure of material facts.

In Craies on Statute Law, 3rd ed., p. 282, the law is stated as follows:—

“Coke says (2 Inst. 200), that ‘it is a maxim in the common law that a statute made in the affirmative without any negative expressed or implied doth not take away the common law.’ But it is doubtful whether this statement can be described as a maxim or considered as more than a very feeble presumption. In *Mayor of London v. R.* (1848), 13 Q.B. 33, Alderson, B., said in the course of the argument: ‘The words ‘negative’ and ‘affirmative’ statutes mean nothing. The question is whether they are repugnant or not to that (common law) which before existed. That may be more easily shewn when the statute is negative than when

it is affirmative, but the question is the same.' And the true rule for interpreting statutes which may affect the rules of common law and equity, and legal and equitable remedies (whatever be the form of the statute), is to consider whether the statutory provision is repugnant to the former substantive or adjective law, or whether it merely operates to strengthen the former law by giving more effectual remedies, whether exclusive or alternative."

While the form of condition number 1 is affirmative, the manifest effect of it is to take away from fire insurance companies the defence of innocent non-disclosure, and therefore it is repugnant to former substantive law as administered by the Court of Chancery on that subject.

For these reasons I would dismiss the appeal with costs.

ORDE, J.A., agreed with MASTEN, J.A.

FISHER, J.A., agreed with LATCHFORD, C.J.

*Appeal dismissed.*

#### [APPELLATE DIVISION.]

BROWN V. CROUCHER AND DOUSE.

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June 12.

*Limitation of Actions—Computation of Time—Highway Traffic Act, sec. 53(1)—Time Expiring on Holiday—Writ Issued on Day Following—Interpretation Act, sec. 28(h).*

An action arising out of a collision of two motor-vehicles upon a highway was begun by a writ of summons issued on Tuesday the 22nd April. The collision took place on the 20th October of the previous year, at about 11 a.m. By sec. 53(1) of the Highway Traffic Act, R.S.O. 1927, ch. 251, which was the enactment in force at the time of the collision, it was provided that no action should be brought for the recovery of damages occasioned by a motor-vehicle "after the expiration of six months from the time when the damages were sustained." The 20th and 21st April were holidays, Sunday and Easter Monday:—

*Held*, having regard to the provisions of sec. 28(h) of the Interpretation Act, R.S.O. 1927, ch. 1, that the action was brought in time.

In the computation the day of the date of the accident was to be excluded; and the argument that the Court should take notice of the hour of the day when the accident occurred, and that the period of limitation expired at 11 a.m. of the 19th April, could not prevail.

*Goldsmiths' Co. v. West Metropolitan Railway Co.*, [1904] 1 K.B. 1, and *Weston v. Fidler* (1903), 47 Sol. J. 567, followed.

*McLean v. Pinkerton* (1882), 7 A.R. 490, is no longer law, having regard to the statute passed in 1887, 50 Vict. ch. 7, sec. 2 (Ont.), now sec. 28(h) of the Interpretation Act.

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AN appeal by the defendants from the judgment of MAHAFFY, Dist. Ct. J., in an action in the District Court of the District of Muskoka, after trial without a jury, awarding the plaintiff \$381 damages for personal injury and damage to his motor-car in a collision with the defendant's motor-car upon a highway. The point raised by the appeal was whether the action was commenced within the period of six months from the *time* of the collision, as required by the Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 53(1), which was the provision in force at the time of the collision.

May 13. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*J. P. MacGregor*, K.C., for the appellants, pointed out that the provision in the Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 53(1), read "after the expiration of six months from the *time* when the damages were sustained"—not from the *day*. Under this wording of the statute, the Court should take notice of the hour of the day when the accident occurred, and, if this were done, the period of limitation fixed by the statute expired at 11 a.m. on the 19th April, and so the plaintiff's action was barred by lapse of time. Reference to *McLean v. Pinkerton* (1882), 7 A.R. 490.

*R. M. Best*, for the plaintiff, respondent, contended that the writ had been issued within the time limited by the statute. The day of the date of the accident was to be excluded in the computation of time, and parts of days were not considered. Reference to *Goldsmiths' Co. v. West Metropolitan Railway Co.*, [1904] 1 K.B. 1; *McCann v. Martin* (1907), 15 O.L.R. 193; *Truss v. Olivier* (1924), 40 Times L.R. 588.

June 12. RIDDELL, J.A.:—In this appeal from the judgment at the trial of his Honour the Judge of the District Court, along with which was made a motion for a new trial, we dismissed the motion upon grounds thoroughly established and we also dismissed the appeal on the merits, but we thought it of sufficient importance that we should write a note on the point of the time for the issue of a writ.

The accident in question, a collision between two automobiles, took place on the 20th October, at about 11 o'clock a.m. The 20th and 21st April were holidays, Sunday and Easter Monday respectively, and the writ was issued on Tuesday the 22nd April. The Highway Traffic Act, R.S.O. 1927, ch. 251, by sec. 53(1), pro-

vides that, "Subject to the provisions of subsections 2 and 3 no action shall be brought against a person for the recovery of damages occasioned by a motor-vehicle after the expiration of six months from the time when the damages were sustained." It was argued that the six months expired at 11 a.m. of the 19th April, and that the writ could not be supported.

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It may be said at once that, had it not been for the case in our Riddell, J.A. own Court of Appeal, *McLean v. Pinkerton*, 7 A.R. 490, there could have been no doubt as to the law in this Province being in that regard the same as the law in England, as thus expressed by Mathew, L.J., in *Goldsmiths' Co. v. West Metropolitan Railway Co.*, [1904] 1 K.B. 1, at p. 5: "The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded." The case in our Court of Appeal decided that, if the five days given for the filing of a chattel mortgage expired on Sunday—the execution being on the 12th July and the 17th falling on Sunday—the filing on Monday the 18th was too late.

Subsequently to this decision, and probably in consequence of it, the Act of 1887, 50 Vict. ch. 7, was passed, which, by sec. 2, adding a new section (16a.) to the Interpretation Act, removed the anomaly. It was in the same sense as our present Interpretation Act, R.S.O. 1927, ch. 1, sec. 28(h), which reads:—

"(h) if the time limited by any Act for any proceeding or for the doing of anything under its provisions, expires or falls upon a holiday, the time so limited shall extend to, and such thing may be done on the day next following which is not a holiday."

There is no reason why this provision should not apply to the present case. In Halsbury's Laws of England, vol. 27, p. 446, many English cases are cited, but no authority is needed in view of the express statutory enactment.

MASTEN, J.A.:—The only point reserved by the Court on the hearing of the appeal related to the question whether the writ was issued within the period limited by the Highway Traffic Act, sec. 53(1), providing that, "subject to the provisions of subsections 2 and 3 no action shall be brought against a person for the recovery of damages occasioned by a motor-vehicle after the expiration of six months from the time when the damages were sustained."

Mr. MacGregor, for the defendants, admitted that, if the words

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of the section had been "six months from the *day* when the damages were sustained," the writ would have been issued in time, but he argued that, as the words are "six months from the *time* when the damages were sustained," the Court would take notice of the hour of the day when the accident occurred, and that the period of limitation fixed by the statute expired at 11 a.m. on the 19th April.

The rule respecting the computation of time in circumstances like the present was long ago adopted by the Courts, and seems to be wide and general in its application. I have found no better statement of the reason on which it is founded than is contained in *Weston v. Fidler* (1903), 47 Sol. J. 567. That was an appeal to a Divisional Court consisting of Wills and Channell, JJ. In the course of his judgment Wills, J., said:—

"One could see why that rule had grown up. It was a rule of convenience, because, if it did not exist, there would be perpetual conflicts as to whether the notice was given, or a particular act had taken place at 12 o'clock, 12.30, or 1 o'clock, and they would have all sorts of questions as to local time and Greenwich time, and questions arising as to whose watch was right, and all sorts of controversies."

He had no doubt that that was the origin of the rule which has now prevailed for a very long time in our law with reference to things which are to be done on a particular day. He could see no reason for departing from the usual rule of construction in these matters, and therefore excluded the day on which the act in question was done, and held that the time only began to run on the next succeeding day.

I think that on the reasoning in that case the usual rule applies here—that the period of limitation did not begin to run until the 20th October and that the writ was issued in time. I agree with the conclusion reached by my brother Riddell.

LATCHFORD, C.J., and ORDE and FISHER, JJ.A., agreed with RIDDELL and MASTEN, JJ.A.

*Appeal dismissed.*

## [APPELLATE DIVISION.]

BOYCE v. NORWICH UNION FIRE INSURANCE SOCIETY LTD.

1931.

June 15.

*Insurance (Automobile)—Indemnity against Liability for Damage Caused by Motor-trucks to Property of others—Express Exception of Trucks with Trailers Attached—Extension of Policy by Endorsement to Cover Trailer—Damage Done by Trailer—Express Exemption of Insurer from Liability—Absence of Written Application for Endorsement—Insurance Act, R.S.O. 1927, ch. 222, secs. 172, 181.*

The defendant society issued to the plaintiff, the owner of three automobile trucks, a policy insuring him against liability for damage that might be caused by any of them to the property of others, the policy declaring that the defendant society "shall not be liable . . . for any loss or damage arising while the automobile is being used with a trailer attached." After the issue of this policy, the plaintiff applied to the society to extend the policy so as to include a "trailer," and paid the society an additional premium, whereupon the society endorsed upon the policy a memorandum purporting to extend the policy to cover "a trailer, licence 527, when attached to any of the trucks insured under this policy." One of the plaintiff's trucks was proceeding westerly along a highway with a trailer attached, and behind this trailer another trailer, the one mentioned in the endorsement. The truck became disabled, and a stranger's truck was connected with the plaintiff's truck, and proceeded along the highway drawing the truck and the two trailers. W., proceeding along the same highway in an automobile, was struck by the rear trailer (527) and his vehicle damaged. W. recovered judgment in an action against the plaintiff for the damages occasioned to him (W.), and the plaintiff brought this action to recover from the defendant society the damages and costs awarded to W.:—

*Held*, that, while the endorsement permitted the plaintiff to use his truck with trailer 527 attached to it, the permission did not extend to the trailer in front of it, which was attached to the truck; it was 527 which struck W.'s car, but it was immaterial which of the four vehicles actually did the damage; the truck was one of them and was being used with a trailer attached to it; the express exemption of the society from liability applied; and the action was rightly dismissed.

Per HODGINS, J.A.:—There was no written application for the endorsement which introduced "trailers" into the insurance contract. The absence of a written application is seldom seriously pressed by insurance companies, and when, as here, the company admits that the endorsement is binding upon it and accepts liability for the loss, if the risk is covered by the policy with the endorsement thereon, the judgment of the Court should be in accordance with the contract which is sued on.

Sections 172 and 181 of the Insurance Act and *Holdaway v. British Crown Assurance Corporation* (1925), 57 O.L.R. 70, and *St. Regis Pastry Shop and Baumgartner v. Continental Casualty Co.* (1928), 63 O.L.R. 337, referred to.

An appeal by the plaintiff from the judgment of ROSE, C.J., dismissing an action upon a policy, issued to the plaintiff by the defendant society, insuring him against liability for damage that

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might be caused by any of his motor-trucks to the property of others.

March 9. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

*F. J. Hughes*, K.C., for the appellant. The exclusion clause in the policy, relied on by the defendant society, which provides that the insurer shall not be liable when the car is used "with a trailer attached," does not apply, because the trailer which did the damage was insured independently of the truck: *Luciani v. British America Assurance Co.* (1930), 65 O.L.R. 687. The words in the endorsement covering the trailer, "when attached to any of the trucks insured under this policy," are not part of the application and are therefore null and void in the endorsement. The application for the endorsement was oral. Therefore, by virtue of the Insurance Act, R.S.O. 1927, ch. 222, only the original application can be looked at. In that application the word "trailer" is not mentioned, but the general word "automobile" does include a trailer under the definition in the Insurance Act, *supra*, sec. 1(5). The appellant, therefore, had absolute insurance on the trailer quite apart from the trucks. The defendant society had no right to limit its liability on the trailer to times when the trailer was attached to one of the trucks.

*V. Evan Gray* and *Waldon Lawr*, for the defendant society, respondent. The respondent society admits that the trailer was attached to the truck within the terms of the endorsement. The loss, however, in this case is excluded by the exclusion clause in the policy, because when the trailer was added in the endorsement, the word "automobile" in the policy must then be read as including truck and trailer. Therefore to operate the "automobile," i.e. the truck plus a trailer, with a second trailer attached, releases the insurer from liability. The presence of the "foreign" trailer places the train within the exception. The endorsement covering trailer 527 is subject to the terms and conditions of the original policy. The truck plus trailer 527 is covered by the policy; but the truck plus trailer 527 plus a second trailer is not covered. Section 174 of the Insurance Act, provides for exclusions such as in this case.

June 15. MULOCK, C.J.O.:—This is an appeal from the judgment of Rose, C.J.H.C.

The plaintiff was the owner of three automobile trucks, and the

defendant society issued to him a policy insuring him against liability for damage that might be caused by any of them to the property of others, the policy declaring that the defendant society "shall not be liable . . . for any loss or damage arising while the automobile is being used with a trailer attached."

After the issue of this policy, the plaintiff applied to the defendant company to extend the policy so as to include a trailer, and paid the society a premium of \$13.12 as additional premium, whereupon the society endorsed upon the policy the following words:—

"In consideration of an additional premium of \$13.12 the within numbered policy is hereby extended to read and cover on a trailer, licence No. 527, when attached to any of the trucks insured under this policy as at February 23rd, 1929, all other conditions remaining unchanged:—

"Public liability . . . . . \$ 6.56

"Property damage . . . . . 6.56

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\$13.12

"attached to and forming policy No. N.C. 4324 of the Norwich Union Fire Insurance Society Limited issued to Boyce Garage and Cartage.

"Dated at Toronto this 23rd day of February, 1929.

"JOHN B. LAIDLAW,

"General Manager."

The plaintiff's claim arises under the following circumstances. One of the plaintiff's trucks was proceeding westerly along the Kingston-road with a trailer attached, and behind this trailer another trailer—licence No. 527—being the trailer mentioned in the endorsement on the policy. The truck became disabled and a truck of the Tanner Transportation Company connected itself with the plaintiff's truck, and proceeded along the Kingston-road drawing the truck and the two trailers.

A Mr. Whitfield was proceeding easterly along the Kingston-road in an automobile, and when passing this train the rear trailer (that is the one to which the policy was extended) struck and damaged Mr. Whitfield's automobile. Mr. Whitfield then brought an action against the plaintiff for the damages occasioned to his automobile and recovered judgment therefor with costs, and this

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action is brought to recover from the defendant society the damages and costs so recovered by Whitfield against the plaintiff.

The extension of the policy permitted the plaintiff to use his truck with trailer, licence No. 527, attached to it, but such permission did not extend to the trailer in front of it, which was attached to the truck. It is true that it was the rear trailer which struck and damaged Whitfield's car, but it is, in my opinion, immaterial which one of the four vehicles making up the train actually did the damage. The truck was one of them and was being used with a trailer attached to it, and, in my opinion, the express exemption of the society from liability applies, and this appeal should be dismissed with costs.

MAGEE, MIDDLETON, and GRANT, J.J.A., agreed with MULOCK, C.J.O.

HODGINS, J.A.:—I agree with the conclusion arrived at by my lord the Chief Justice.

A subsidiary point was raised, namely, that there was no written application for the endorsement which introduced "trailers" into the insurance contract.

It was urged that "automobile" by its definition includes a trailer, so that it is in law covered by the original application. But it was not so intended in fact. The point as to non-compliance with sec. 172 of the Ontario Insurance Act, R.S.O. 1927, ch. 222, has been considered in relation to sec. 171(1), and I think disposed of, in two cases, *Holdaway v. British Crown Assurance Corporation* (1925), 57 O.L.R. 70, and *St. Regis Pastry Shop and Baumgartner v. Continental Casualty Co.* (1928), 63 O.L.R. 337. In the latter case it was held that "in the case of a policy issued without the written application required by sec. 171(1), but adopted by both parties, the assured is bound by material misrepresentations set out in the policy; and the plaintiff's action was dismissed, the misrepresentation being considered material as well as false."

In the former case Latchford, C.J., said (p. 83):—

"Having regard to the prohibition, the question arises: Was the policy void or only voidable? If, by reason of the prohibition, the policy was void, the plaintiff is out of Court. It is trite law that a void contract can create no legal obligation. If the policy was voidable, it must be because one or other of the parties chooses

so to regard it, and so to contend. Both plaintiff and defendants rest their respective rights on the policy, the plaintiff, however, repudiating responsibility for the statements appearing on its face, copied, as stated, from the application, representing to the company that it had been signed by the plaintiff, but, in fact, signed only by his agent not authorised in writing. The section appears to me to be enacted for the protection of both the insurer and the assured. If both choose, as in the present case, not to rely on the prohibition which it contains, it may, in my opinion, be wholly disregarded, and I can concur in the opinion, expressed in the Court below, that the matters in issue fall to be determined on the provisions of the policy itself."

This view of the statute is a reasonable one and does no injustice to either party. Indeed sec. 181 protects the insurer against the consequences of imperfect compliance by any insurance company with any of the provisions of the Insurance Act, and provides that it shall not render the contract invalid as against the insured. The insurance company runs a risk of having its licence to operate cancelled if it ignores the requirements of the statute. The whole case of the insured depends on the policy which has been issued to him. Thus the absence of the written application is seldom seriously pressed by insurance companies, and where, as here, the company admits that the endorsement is binding on it, and by its counsel states that it accepts liability for the loss, if the risk is covered by the policy with the endorsement thereon, the judgment of the Court should be in accordance with the contract which is sued on.

The appeal should be dismissed.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

BALNE V. SUNNYSIDE AMUSEMENT CO. LTD.

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*Negligence—Amusement Machine ("Whoopee Wheel")—Breaking of Shaft—Latent Defect—Injury to Passengers—Findings of Jury—Defendant not Providing Emergency Brake—Additional Finding of Fact by two Members of Appellate Court—Judicature Act, R.S.O. 1927, ch. 88, sec. 26—Knowledge of Defect not Attributable to Defendant—Divided Court.*

June 15.

In an action for damages for injuries sustained by the plaintiffs by the sudden stopping of an amusement device known as a "Whoopee

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Wheel," upon which they were seated as paying passengers, the jury at the trial found that the negligence of the defendant S. in not providing an emergency brake was the cause of the breaking of the shaft and the consequent injuries; and the trial Judge entered judgment for the plaintiffs. Upon appeal, a Court of four Judges was divided, and the appeal was dismissed.

*Held*, by HODGINS, J.A. (MAGEE, J.A., concurring), that the finding of the jury was not to be considered as negating all other charges of negligence; and the Court had power to, and should, under sec. 26 of the Judicature Act, add to the jury's findings one of negligence in that the defendant S. did not provide a proper and sufficient safety device to render it impossible for passengers to fall out of the machine during its operation, including its operation in case of failure of the only brake that was provided. And, with this supplementary finding, the appeal should be dismissed.

It should be assumed that the ruling in *Andreas v. Canadian Pacific Railway Co.* (1905), 37 Can. S.C.R. 1, at p. 10, that a jury's finding of a particular act of negligence must be considered as having negated all other charges of negligence, which ruling had been consistently followed by the Courts of this Province, had no relation to sec. 26, which was in force in 1905, and that attention was not directed to it in the *Andreas* case.

*Per* MIDDLETON and GRANT, J.J.A., disagreeing with the above view, that the plaintiffs failed because they could succeed only by proving some breach of duty on the part of S., which they did not prove; S. was not an insurer; and as, in face of a charge of which the plaintiffs could not complain, the jury had failed to find the facts necessary to enable the plaintiffs to recover, no useful purpose would be served by granting a new trial, and the action should be dismissed.

There was nothing to indicate that S. knew or ought to have known of the defect in the shaft of the machine, and there was no evidence that he knew or ought to have known that a brake should have been supplied upon the machine to provide for the event of a fracture in the shaft taking place. The breaking of the shaft was due to a latent defect which could not have been detected either by S. or by his servants or by the manufacturer from whom he procured the machine, and S. could not be held responsible.

Review of the authorities—*Readhead v. Midland Railway Co.* (1869), L.R. 4 Q.B. 379, specially referred to.

APPEALS by the defendant Solman from the judgment of LOGIE, J., in two actions brought by passengers upon a "Whoopee Wheel" to recover damages for injuries sustained by them by the sudden stopping of the wheel, by reason, as the jury found at the trial, of the negligence of the appellant in not providing a proper emergency brake. The jury also found that the appellant's negligence was the cause of the disaster; and the trial Judge entered judgment for the plaintiffs.

April 9. The appeals were heard by MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*F. J. Hughes*, K.C., for the appellant, contended that the trial Judge, having put questions to the jury and they having brought

in answers which were intelligible, was functus, and had no jurisdiction to re-charge them. He ought to have given judgment in favour of the appellant. The trial Judge erred in stating to the jury that there was an implied warranty of safety as to latent defects: *Readhead v. Midland Railway Co.* (1869), L.R. 4 Q.B. 379. Assuming that there was an implied warranty as to safety, there was no duty cast upon the appellant to provide brakes capable of preventing injury resulting from every accident caused by latent defects. The defendants were carriers of persons and as such their liability is limited. Reference to *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck*, [1929] A.C. 358; *Elliott v. Toronto Transportation Commission* (1926), 59 O.L.R. 609; *Oliver v. Saddler & Co.*, [1929] A.C. 584.

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*H. A. Newman*, K.C., for the plaintiffs, respondents, contended that the trial Judge had jurisdiction to re-charge the jury, as their answers were not consistent with the evidence: *Jolicoeur v. La Cie. de Chemin de Fer du Grand Tronc* (1908), Q.R. 34 S.C. 457. Counsel for the appellant raised no objection at the trial to the Judge re-charging the jury, and it is too late for him to do so now. Reference to *Midland Railway Co. v. McDougall* (1906), 39 N.S.R. 280; *Spencer v. Alaska Packers Association* (1904), 35 Can. S.C.R. 362; *Rayfield v. B.C. Electric Railway Co.* (1910), 15 B.C.R. 361. The cause of the accident was the negligence of the appellant in not equipping the machine with an emergency brake: *Cottingham v. Longman* (1913), 48 Can. S.C.R. 542; *Gaiser v. Niagara St. Catharines and Toronto Railway Co.* (1909), 19 O.L.R. 31; *Fleming v. Toronto Railway Co.* (1912), 27 O.L.R. 332.

*Hughes*, K.C., in reply. There is no evidence to support the respondents' contention that the accident could have been avoided if the machine had been equipped with an emergency brake.

June 15. HODGINS, J.A.:—Appeal by the defendant Solman from the judgment pronounced after trial on the findings of the jury by Mr. Justice Logie.

The facts and findings are adequately set out in the judgment of my brother Middleton.

The breaking of the shaft carrying the pinion-wheel did not produce the accident which followed, though its failure, due to the fracture, to act on the cog-wheel and thus control the cars, was

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the cause why the subsequent action of the operator resulted in the severe injuries suffered by the plaintiffs. The movement of the belts round what is called the ellipse to which all the seats were attached was stopped because the pinion-wheel failed to act on the wheel which turned (at the other end) the pulley carrying the shafting to the belts on which were the triangles from the apex of which the seats hung.

The finding of the jury that the defendant was negligent in not providing on this machine an emergency brake is fully warranted. It would seem to me that in all machines designed to move or carry people whose safety depends wholly on (1) the sufficiency and safety of the machine itself, and (2) the precautions which are taken to provide for a breakdown of any part of the mechanism or the want of care of its operator, negligence arises when either of these safeguards is omitted. Instances such as rack and pinion railways, passenger elevators, street-cars in crowded centres, will at once suggest themselves.

To operate, high up above the sole cog-wheel on a single light shaft moving belts to which some 14 heavy seats were attached filled by people, in which operation a swiftly accelerated movement was imparted to the seats as they came down from the crest, without any contrivance for stopping or controlling the movement except by one pinion-wheel, is, where the safety of lives is at stake, a great risk and one needing that special precautions should be used. The duty of the defendant in this case towards employees is thus expressed by the Judicial Committee in *Toronto Power Co. Ltd. v. Paskwan*, [1915] A.C. 734:—

“The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants. He is not bound to adopt all the latest improvements and appliances; it is a question of fact, in each particular case, whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence.”

In *Smith v. Baker*, [1891] A.C. 325, 353, Lord Watson remarks that

“The judgment of Lord Wensleydale in *Weems v. Mathieson* (1861), 4 Macq. 215, 226, 149 R.R. 322, clearly shews that the noble and learned Lord was also of opinion that a master is responsible in point of law not only for a defect on his part in providing

good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.”

The duty to invitees is just the same.

Willes, J., in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, 288, in dealing with the duty owed to a “customer,” says [as quoted in Pollock on Torts, 13th ed., pp. 528, 529] :—

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“The class to which a customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

“And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.”

The learned author then proceeds:—

“The Court goes on to admit that ‘there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place would reasonably be, having regard to the contrivances necessarily used in carrying on the business.’”

And at p. 130, the author goes on:—

“The right arising from invitation as above defined may co-exist with a right arising from contract, as where the person entering on a building or structure has paid for admission. Such a person is entitled, without qualification, to find a state of things as safe for the purpose in hand as reasonably competent care and skill can make it . . . .”

And at p. 534:—

“The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails a like duty on the occupier, or rather controller.”

The evidence on this point was given by one Corman, a mechanical engineer of 21 years’ standing and a graduate of the University of Toronto in that faculty. He says:—

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"Q. If the brake operating on the shaft goes off, is there any emergency brake? A. None.

"Q. Should there be? A. Absolutely.

"Mr. Newman: How could that be applied? Would it be a simple operation? A. Yes, it would have to be applied right next to the machine, to be sure; as close to the machine as possible.

"His Lordship: When you speak of the machine, you mean the ellipse? A. Yes.

"Q. Why? A. In order to cut out all mechanism behind it that might go out of order.

"Q. In other words, you do not consider, for the safety of the public, or the safety of those who use that machine, that an ordinary brake operating on the shaft is enough? A. I think it would be enough, my lord—it will act.

"Q. It will not, but if it goes out of order there is nothing else? A. If that goes out of order there and there is no proper arrangement of the people in the seats, it is very dangerous.

"Q. Not loaded properly? A. If you have all the seats loaded and the brake goes out of order it is all right.

"Q. If the brake on the shaft went out of order, and the people were loaded right—

"Mr. Newman: Were evenly distributed.

"His Lordship: That is, if the weight was evenly distributed?

A. Uniformly distributed round the ellipse.

"Q. That is, if the weight of the people riding was uniformly distributed, there would be no necessity for an emergency brake? A. No.

"Q. Because the people would balance themselves? A. Yes.

"Q. Otherwise, there ought to be an emergency brake? A. The usual practice of machine design, where there are lives at risk, is always to have a last brake, an emergency brake; but I would not say that this thing could not be operated all right, with proper care . . . .

"If several seats are left vacant, and the others loaded? A. Very dangerous.

"Q. And there should be an emergency brake? A. Yes, for safety."

In such a case as this the defendant cannot shield himself behind the manufacturer.

Turning now to another point, namely, the insecurity or instability of the bar in the seat placed across in front of the passenger, the jury did not find this to be a defect indicating negligence in the defendant, although its failure to remain in place precipitated the plaintiffs to the ground. The learned trial Judge in charging them said this:—

“Corman says there could have been a locking of the safety bar to prevent it flipping out if the seat described an arc of 120 degrees. Was that a reasonable precaution to have taken to prevent the safety bar opening, and the passengers from falling out? The defendant relies on the value of the bar itself, that it was a safety bar so far as it went. Case said it was his duty and instructions to test them after the passengers were in the seats; he went round and shook every bar to see that it was home, as you might say. Now were those bars defective as safeguards when the seat was turned through an arc of 120 degrees? If there had been some lock on those safety bars would the plaintiffs have fallen out at all? Mr. Balne described how the bar came out, and how he held on to it as hard as he could, but the weight of his wife on the inner side pushed him off. Could it be called a safety device at all, when it came out of the socket? Was it the sort of thing that could reasonably be anticipated, and should there have been a lock on the bar to prevent it coming out, if the machine took on sudden excessive speed, causing the seats to describe a swinging motion sufficient to allow that bar to drop out? You may think it was something which some one concerned should have thought of, because each of the seats described a whole circle when they swung free.

“Now, should the occupier have anticipated just what happened here, namely, that there would be a jerk due to some unavoidable or unascertainable defect in the machinery? Suppose there was a latent defect there as alleged, and something went wrong with the ordinary brake, we will say a pure accident, then should the occupier have considered there might be a racing, and abnormal swinging of the seats, and so an accident if the safety bar dropped out? It is all for you to say, gentlemen. And it is for you to say whether the defendant in these respects made the machine as safe for the purpose intended as reasonable care and skill could make it. You may think that in a device of this kind, which is calculated to produce a thrill, or whopee, by its accelera-

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tion over the crest of the ellipse, it was reasonable to do something more than was done to make the machine reasonably safe. But you are the judges of that."

The statement of Fitzpatrick, C.J., in *Andreas v. Canadian Pacific Railway Co.* (1905), 37 Can. S.C.R. 1, at p. 10, to the effect that "the jury, with such clear and direct instructions on the point, having answered that the cause of the accident was the failure to reduce speed under section 259 of the Act, must be considered as having negatived all the other charges of negligence," has been consistently followed by the Courts of this Province. I may venture the view that when that statement was made it had no relation to sec. 26 of the Judicature Act, R.S.O. 1927, ch. 88, which was in force from 1897 to 1913 as a Rule of Court, and since then as a section of the Judicature Act. It may well be assumed that the attention of the learned Chief Justice had not been called to this particular rule. It is as follows:—

"26.—(1) The court upon an appeal may give any judgment which ought to have been pronounced and may make such further or other order as may be deemed just.

"(2) The court shall have power to draw inferences of fact not inconsistent with any finding of the jury which is not set aside, and if satisfied that there are before the court all the materials necessary for finally determining the matters in controversy, or any of them, or for awarding any relief sought, the court may give judgment accordingly, but if the court is of opinion that there are not sufficient materials before it to enable it to give judgment the court may direct the appeal to stand over for further consideration and may direct that such issues or questions of fact be tried and determined and such accounts be taken and such inquiries be made as may be deemed necessary to enable the court on such further consideration finally to dispose of the matters in controversy."

The jury have not expressly found on the allegation of negligence thus set forth in the pleadings as "not providing a proper safety device for passengers on the seats of cars provided on the said Whoopee Wheel." As to this there is no "finding" of the jury such as is intended to be described in the statute. If it was intended by the statute to mean that the unexpressed opinion of the jury on the point is to be taken as an affirmative finding, other and more pertinent words would have been used. It is not shewn in any way that the jury intended to say affirmatively that the

defect alluded to had no effect on the accident. Their silence might, however, just as well have meant "not proven," or not considered, or just ignored. I do not, therefore, in this particular case, think the remark of the learned Chief Justice applicable here; and, as we have here all the material necessary, the Court can make a substantive and additional finding.

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The actual bar, which was intended to pen the occupants in their seats, fitted at one end into a notch, the entrance to which was closed by a short pivoted piece of metal, heavily reinforced at the outer end, which was effective enough when the cars were in a position where the force of gravity would bring the metal end across the notch and close it, but would act in the reverse way when the force of gravity impelled it in a direction away from the notch. Thus the bar was free to fall out of its resting place, and it did so when the rapid fall of the wheel and its quick jerk backward (called in the evidence a "whip" or "whipping") operated to shift its position, so opening the way for the bar to slip out, with the result that . . . the passengers were shot out.

The following occurs in the examination of the operator, Case:—

"A juror: Will you tell us again at what position the machine was when the passengers were tipped out, was it after the cross-bar came out, after the whipping that the machine got? A. It was coming the wrong way to the ride.

"Q. After the whip? A. It kept whipping until it came to a standstill.

"Q. Was it not the acceleration of the machine that threw them out? A. It was the whip back."

The bar and its action are thus described in Corman's evidence:—

"Two people sit in the seat, this being open, and when it is ready to go, the operator drops this, and there is a bar in front of you to hang on to and it is a solid bar.

"His Lordship: Where does it come on the body? A. just about the stomach.

"Mr. Newman: How is that bar opened? If you are sitting in your chair, how can you open the bar of your own effort? A. By lifting this weight.

"Q. Is there any other way the bar can come open by operation of the machine? A. Not in the normal operation.

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"Q. Abnormal, or any way you want to put it? A. Yes.

"Q. How could that be done? A. If the seat was allowed to swing freely like this, it gives excessive acceleration and it would swing out in something like that position; when it turns in that position it would be—it would turn say 120 degrees, and the bar would fall out itself. I can demonstrate that here. If you turn it suddenly it is sure to fall out.

"His Lordship: How do you say it could fall out? If there was excessive acceleration you say the seat would turn to 130 degrees and the bar would fall out by force of gravity? A. Yes, gravity.

"Q. But the acceleration that the last witness has described, at the ends, would not materially affect it. In other words, the "whoopie thrill?" A. Yes, the whoop.

"Q. That would not affect the bar and the bar should not fall out just by that whoop? A. No.

"Q. Well now you were going to shew how the bar would come out and let the passenger fall on the fence? A. If for no other reason than the increase in its speed.

"Q. Unduly increased? A. Yes, more than it was designed for, that is the tendency for the seats which are just going over the crest, the backward swing is greater.

"His Lordship: Your theory of the accident is that this seat was suddenly accelerated, and the bar dropped out, by gravity, and then there was nothing to prevent the plaintiff falling on the fence? Is that right? A. That is right.

"A. Yes. And there were no seats loaded further around; then the sudden jerk of the machine, when these loaded seats came to the crest with that condition, there would be a violent racing of the mechanism for this load to find its level on the bottom.

Q. With what result? A. The result of that rapid acceleration would tend to turn those particular seats over.

"His Lordship: At what angle? A. I can't say what angle.

"Q. But an angle sufficient to allow the bar to drop out? A. No doubt, it only needs to go about 120 degrees and it goes out."

I would, in view of our statutory power under the Judicature Act, and on the assumption that I have ventured to make, add to the jury's findings one of negligence made by this Court in that the defendant did not provide a proper and sufficient safety device to render it impossible for passengers to fall out of the machine during its operation, including its operation in case of the failure of the only brake that was provided.

For the reasons I have given, I would dismiss the appeal with costs.

MAGEE, J.A., agreed with HODGINS, J.A.

MIDDLETON, J.A.:—An appeal by the defendant Solman from the judgment pronounced, after the trial of this action with a jury, by Mr. Justice Logie on the 23rd May, 1930, whereby it was adjudged that the plaintiff Frank Balne do recover against the defendant Solman the sum of \$8,698.40, and the plaintiff Elizabeth Balne do recover from him the sum of \$10,918. By the same judgment the action as against the defendants the Sunnyside Amusement Company and Case was dismissed without costs.

The action is the result of a serious accident which took place at Sunnyside Beach on the evening of the 21st June, 1929. The defendant Solman operated an amusement device known as a "Whoopee Wheel" upon which the plaintiffs were passengers.

The amusement device in question consists of a number of swinging cars suspended from supports which are attached to a moving belt which carries them around a horizontal ellipse at some distance from the ground. Passengers enter these suspended seats at the ground level and are carried in its suspended chairs around the ellipse. So long as the motion is horizontal the speed is moderate, but as the suspended cars pass over the ends of the ellipse the speed is greatly accelerated and the passengers are supposed to enjoy the sensation of rapidly falling. The car is set in motion by electrically driven machinery.

On the evening of the day mentioned, a shaft carrying a cog-wheel broke, and, as this was essential to the transmission of power, the machine came to a standstill. There were then many passengers, some of whom were in cars near the ground and others were in cars suspended high in the air. The car having come to a standstill, and it being evident that there was something wrong, the passengers in the lower cars proceeded to alight which speedily

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brought about a condition of unstable equilibrium, as those in the upper cars were far above the centre of gravity. In the normal operation of the machine this would not have occasioned disaster, as the motion of the suspended cars was controlled by a brake carried by the shaft which broke. The breaking of this shaft placed the brake out of operation. To bring the passengers suspended at height to the lower level where they could alight, a number of men joined the operator in "man-handling" the machine, shoving the lower cars along so as to bring the upper cars down to enable the passengers to alight. This resulted in disaster, as the weight of the passengers in the upper cars was not counter-balanced by the weight of passengers in the lower cars and proved altogether too much to be controlled by the men who were handling the concern. The result was that it broke away, rotated rapidly, and the plaintiffs and others were thrown from the cars and very seriously injured. This action followed.

At the hearing it was established and not contradicted that Solman had purchased the machine, a new machine, from manufacturers of high repute, that he had bought it as the best available amusement machine adapted for the purpose for which it was used, and that he and those operating the machine had no knowledge of the defect which resulted in the disaster.

The plaintiffs allege that their injuries were sustained by reason of negligence in that the defendant did not provide a proper safety device for passengers in the seats or cars, and did not provide an emergency brake, or a competent engineer to operate the machine, and in that the defendant failed to remove the plaintiffs from the seat they occupied while it was still suspended in the air and in pushing forward and causing the cars to move with such sudden and violent motion as to result in the accident.

A series of questions was submitted by the trial Judge to the jury. The jury brought in answers to these questions, but the answers did not appear to be satisfactory to the trial Judge, who directed the jury to reconsider them, and as the result of reconsideration the jury brought in a modification of the answers first submitted. Upon the appeal there was much adverse criticism of what was done by the learned trial Judge, but in the view that I take of the case it is not necessary to enter into this discussion, for in my view the plaintiffs are not entitled to recover either upon the original or the amended answers.

The questions submitted and the answers given are as follows:— App. Div.

“Did the defendants make the machine in question as safe for the purpose as reasonable skill and care could make it?” The first answer was “Yes, under normal conditions, but not in the case of an emergency.” On reconsideration this answer was stricken out and the answer “No” substituted. 1931.  
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The second question was, “If not; in what respect did they fail to do so? Answer fully.” This was not answered in the first place, but after the reconsideration was answered, “By not supplying emergency devices.” Middleton,  
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The third question was, “Was the injury suffered by the plaintiffs the result of the defendants’ failure to make the machine reasonably safe for the purpose intended?” The answer to this was, “Yes, by not supplying emergency devices.”

The fourth question read, “Or was the accident a pure accident for which no one is responsible?” Originally this was not answered, but on reconsideration the answer was given, “We find defendant responsible for not supplying safety device.”

The fifth question was, “Or was the accident caused by latent defect in the machine which could not be discovered by reasonable care and skill on the part of any one concerned with the construction, repair, or maintenance of the machine?” This is answered “Yes,” and on reconsideration was not changed.

The sixth question read, “Was the defendants’ machinist guilty of any negligence which caused the accident?” Answer “No.” This also remained unchanged.

The other questions are not now material.

To understand these answers it is necessary to call to mind that in the course of the evidence the machine was criticised as being defective in that there were not adequate emergency devices. Two defects were suggested. In the first place it was said that there should have been a second brake so operating that it would be in no way related to or depending upon the brake which was ordinarily relied upon on the shaft which broke, and the second suggested defect was that the cars or seats in which the passengers sat had a bar which was fastened over the passenger in the car so that a jerk would not allow the passenger to be thrown from the seat. These bars, it was said, were not adequately secured, and it was possible that by a series of jerks in different directions the bars were unfastened and passengers might fall out. It was prac-

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tically conceded upon the argument that what the jury intended to refer to was the emergency brake, and that the suggested fastenings of the bars across the seats were not intended to be included as an emergency device.

In the course of his charge the learned trial Judge, I think, placed the liability of the defendant on altogether too high a plane. He has practically made the defendant the insurer of the passengers in the machine. He says:—

“It is no defence to say that the machine was purchased from a reputable firm at the market price, that it was new and the makers or purchasers thought it was reasonably sufficient. The point is, was it in fact reasonably sufficient as far as reasonable care and skill could make it.”

Earlier in his charge the learned trial Judge had defined the word “occupier” as meaning “a man who is responsible for the safety of the machine,” and stated the law to be that, where an occupier agrees for reward that a person shall have the right to enter and use the premises, those premises or a house, shop, theatre, or amusement machine, for a mutually contemplated purpose, the contract, unless it provides to the contrary, contains an implied warranty of safety, that is that the machine, as in this case, was as safe for the purposes intended as reasonable care and skill could make it, but the defendant is not liable for defects which could not have been discovered by reasonable care or skill on the part of any one concerned, that the construction, alteration, repair or maintenance of the machine, and, subject to that limitation, it matters not whether the lack of skill or care was that of the defendant or his servant or an independent contractor, or, as in this case, the original vendor . . . the duty is a contractual one and does not rest on the negligence of the defendant or his servants. This duty is a contractual duty to make the machine as safe as reasonable skill and care can make it before taking on paid passengers.”

The case of *Readhead v. Midland Railway Co.*, L.R. 4 Q.B. 379, established the doctrine, never since questioned, that the contract made by a general carrier of passengers for hire with a passenger is to take due care, including in that term the use of skill and foresight to carry the passengers safely and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, that is to say free from all defects

likely to cause peril, although these defects were such that no skill, care, or foresight could have detected their existence. This case shewed that there was no liability on the part of the carrier who had purchased from a reputable maker a car which had in it a latent defect arising from a blow-hole in a casting. This defect resulted in an accident in which the plaintiff was injured, but he was without remedy.

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The doctrine has been applied in various ways. One who is not himself an expert in designing and manufacturing machinery is not liable for a disaster which happens by reason of the defect in design or construction of the machine if he has purchased a machine apparently suitable for its purpose from an established manufacturer of such machinery with a good reputation.

This principle has been declared to be that applicable in cases of this kind in two cases, both determined by the Court of Appeal in England—the first is *Cox v. Coulson*, [1916] 2 K.B. 177. There the plaintiff, a young woman, had purchased a ticket to a performance in a theatre. As part of the show fire-arms were discharged. They were supposed to be loaded with blank cartridges. By some accident a loaded cartridge was fired and the plaintiff was injured. The defendant had been found liable, but the Court of Appeal reversed this decision; Swinfen Eady, L.J., saying (p. 181):—

“The defendant does not absolutely warrant the security of his premises (*Readhead v. Midland Ry. Co.*). He does, however, warrant, not only that there shall be due care on the part of himself and his servants, but also that there shall be due care on the part of any independent contractor who may have been employed by him in the construction or repair of the premises.”

Pickford, L.J. (p. 187), describes the relationship as that “of invitor and invitee, and in such a case, from the nature of the invitation, the defendant’s obligation, I think, is not confined to the structure. In addition to his obligation with regard to the structure and the further obligation not to give a performance of an intrinsically dangerous nature, or, if he did so, to take the consequences, he is, I think, under an obligation to take reasonable care that the performance of the play does not expose to danger the person whom he invites to see it.”

The second case is *Sheehan v. Dreamland Margate Ltd.* (1923), 40 Times L.R. 155, a case which in some respects more nearly

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resembles that now in hand. The defendants owned the property. They sublet for the purpose of side-shows. The plaintiff bought a ticket for a side-show from the concessionaire. As part of the side-show the plaintiff is invited to take a seat in a contrivance which would throw her in the air. She was invited to sit on this apparatus in a wrong position and was injured as the consequence of this. It was held, following *Cox v. Coulson*, that the position of the defendants and the plaintiff was that of inviters and invitee, and, as there was no evidence that the performance was intrinsically dangerous, and no evidence of any negligence on the part of the defendants or any servant of theirs, the plaintiff could not recover.

The measure of liability on the part of an invitor to the invitee is concisely stated in *Indermaur v. Dames*, L.R. 1 C.P. 274, 277, 288, and in *Norman v. Great Western Railway Co.*, [1915] 1 K.B. 584, 592, per Buckley, L.J.:—

“The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it.”

Here plainly there is nothing to indicate that Solman knew or ought to have known of the defect in the shaft of the machine, and it is equally true that there is no evidence that he knew or ought to have known that a brake should have been supplied upon the machine in the event of a fracture in the shaft taking place. This was a matter for engineers and mechanics, and there is nothing by which this responsibility is cast upon the purchaser.

After the fracture of the shaft had taken place, without the aid of any brake, the machine had come to a position of rest, and the misfortune which befell the plaintiffs and other passengers arose from the panic that seemed to have possessed the man operating the machine and sundry spectators who in the agony of the emergency sought to remove the plaintiffs and the other passengers from a position of safety because of the supposed peril in which they were. The answers of the jury exonerate Solman, as they exonerate his servant and agent who was alone in charge of the machine at the time.

The plaintiffs fail because in this case they can only succeed by proving some breach of duty on the part of the defendant, and this they have failed to prove. Those who take part in the use

of amusement machines, of which this is a sample and a type, ought to realise that when they seek enjoyment in this way they assume a great risk, for the conductor of the performance is by no means an insurer.

I can see no useful purpose in granting a new trial, for, in face of a charge of which the plaintiffs cannot complain, the jury has failed to find the facts necessary to enable the plaintiffs to recover, and where this judgment in any way proceeds upon facts not found by the jury there is no conflict whatever upon the evidence.

I would allow the appeal and dismiss the action, but I would give no costs.

There is a second action brought by the infant son of the plaintiffs tried with it. It shares the like fate.

GRANT, J.A.:—In this appeal the facts have been sufficiently stated in the reasons for judgment of Middleton, J.A., which, with those expressed in the opinion of Hodgins, J.A., I have had the privilege of reading. I desire to express, as briefly as possible, the way in which the issues involved present themselves to my mind, and the reasons for my concurrence in the result reached by my brother Middleton, and why I find myself, with very great respect, unable to agree with the conclusions of my brother Hodgins.

Having examined with a good deal of care the views expressed by the various text-book writers upon the nature and extent of the duty owing by licensors to licensees, by inviters to invitees, and by vendors, whether of chattels or of accommodation upon stands for viewing races, or in carriages or upon railway trains for transportation, to those to whom these chattels or privileges are transferred for a consideration, I find that the learned text-book writers do not appear to be in agreement. For example, I find that the duty owed by inviters to invitees is considered by some to be the same as that owing by vendors to their vendees, while by others the duty of the latter is deemed to be higher in degree than that owing by the invitor to his invitee. I find also that one text-writer appears to be of opinion that the implied warranty on the part of an invitor does not extend beyond himself and his servants, and will not extend to render him liable for negligence on the part of an independent contractor of good standing and who possessed

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a reasonable degree of skill and competence for the execution of the work entrusted to him. On the other hand, it is stated in the 13th edition of Pollock on Torts, at the foot of p. 530:—

“I can see no reason for thinking that the duty declared in *Indermaur v. Dames* can be escaped by delegating its performance to an independent contractor.”

At first glance the decisions in *Readhead v. Midland Railway Co.*, L.R. 4 Q.B. 379, and *Francis v. Cockrell*, L.R. 5 Q.B. 501, would appear to be in conflict. A careful examination of these decisions, however, has satisfied me that, notwithstanding that some expressions used might lend colour to the other view, yet the two decisions are quite in accord with each other.

Referring first to the *Readhead* case, I find that the plaintiff's injuries resulted from the derailment and upsetting of the railway carriage in which he was travelling, the accident being caused by the breaking of the tyre of one of the wheels of the railway carriage owing to “a latent defect in the tyre which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking” (p. 381).

On the same page it is stated that the contract of a carrier of passengers and the obligation undertaken by him “are to take due care (including in that term the use of skill and foresight) to carry a passenger safely. It, of course, follows that the absence of such care, in other words negligence, would alone be a breach of this contract, and as the facts of this case do not disclose such a breach, and on the contrary negatived any want of skill, care or foresight, we think the plaintiff has failed to sustain his action.”

On p. 393 it is expressly stated that “The case negatives any fault on the part of the manufacturer,” and that therefore it was not necessary for the Court “to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employed to construct works, or to make or furnish the carriages and other things they use . . . . ‘Due care’ however undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed or however rigidly enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being

compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected."

Briefly stated, therefore, the effect of the *Readhead* decision is that the carrier undertakes to exercise due care to carry his passenger safely, and that this includes the use of skill and foresight: but it does not include or entail a liability for a latent defect which could not, by the exercise of reasonable care, skill or foresight on the part either of the carrier himself or of the manufacturer from whom the carriage was purchased, be detected. On the other hand, as negligence on the part of the manufacturer was expressly negatived, the Court very explicitly stated that they were not expressing any opinion as to the extent to, or as to the circumstances under which, the carrier might be liable for want of care on the part of the manufacturer from whom the carriage had been procured. The question therefore as to the liability of the carrier for negligence on the part of the manufacturer was left open and undetermined. That question was decided in *Francis v. Cockrell*, *supra*, in the following year.

The decision of the Court of Queen's Bench is to be found in L.R. 5 Q.B. 184, and on further appeal, the decision of the Exchequer Chamber is to be found in the same volume at p. 501. The effect of the decision is, stated very briefly and perhaps incompletely, that, although the defendant was personally free from negligence, yet he was liable in damages to the plaintiff for injuries resulting from the breaking down of a stand erected for viewing a public exhibition and for admission to which the plaintiff had paid a fee, notwithstanding that the defendant had employed a competent contractor to erect the stand, such contractor having been guilty of negligence in its erection. The judgment of the Court of Queen's Bench was delivered by Hannen, J., who, referring to the decision in the *Readhead* case, says (p. 192) that that decision "expressly leaves undetermined the further question whether the carrier also undertakes that due care has been used by those who have contracted with him to provide the means of conveyance;" and that (p. 193) "It becomes necessary, therefore, for us to consider whether the contract by the defendant to be implied from the relation which existed between him and the plaintiff was that due care had been used, not only by the defendant and his

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servants, but by the persons whom he employed as independent contractors to erect the stand."

The Court of Queen's Bench held that, as the carrier is able to protect himself by his contract with the manufacturer or vendor to him against negligence or want of care in the manufacture of the carriage, but the purchaser has no remedy against the manufacturer for injuries resulting from any such negligence on the manufacturer's part, it is but reasonable to imply an undertaking on the part of the carrier that due care has been exercised in the manufacture of the carriage, whether the carriage was manufactured by him or by some person with whom he contracted for its supply to him. A number of the authorities leading to that conclusion were reviewed.

The decision of the Court of Queen's Bench was affirmed in the Exchequer Chamber, and Kelly, C.B., on p. 504, makes the following statement:—

"It appears that the ground of the decision in the Court below was, that the defendant had contracted against any defect in the construction of the stand, occasioned by reason of his own negligence or of the negligence of the persons who had erected the stand. Though entirely adopting that as the ground of the decision in the Court of Queen's Bench, I should rather express myself differently and say, that what the defendant in a case like this contracted for was, that the stand upon which he supplied a seat to the plaintiff for the pecuniary consideration of 5s., should be reasonably fit for the purpose for which it was supplied to him, without any other exception or qualification than that which was held to apply to such a contract in the case of *Readhead v. Midland Railway Co.*, that is, that the defendant did not contract against any unseen and unknown defect which there was no means of discovering or ascertaining under ordinary and reasonable modes of inquiry or examination."

The Chief Baron then went on to consider not only the *Readhead* case, but also *Grote v. Chester and Holyhead Railway Co.* (1848), 2 Ex. 251, which was the case of a bridge erected for a railway company by competent engineers, who however were guilty of negligence or want of care and skill in the construction of the bridge. In that case it was held that the railway company, although not themselves guilty of negligence, had impliedly contracted with their passenger that the bridge was reasonably safe

for the use to which it was to be put; that is for the carriage of passengers in the railway company's carriages over the bridge. The railway company was responsible not merely for its own negligence or that of its servants, but also for the negligence of an independent contractor, notwithstanding that such contractor was fully competent to exercise the necessary skill in the construction of the bridge. At the foot of p. 507 and top of p. 508, the learned Chief Baron states that

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"The true distinction, therefore, which pervades the whole of the cases is this: First there is the principle which I hold to be well established by all the authorities, that one who lets for hire, or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a stand from which to view a steeplechase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant, and does impliedly contract, that the article or thing is reasonably fit for the purpose to which it is to be applied; but, secondly, he does not contract against any unseen and unknown defect which cannot be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry and examination."

As stated by Keating, J. (p. 513), and by Montague Smith, J. (on the same page), there is in such cases an implied undertaking on the part of the defendant that due care has been used in the construction of the stand, whether constructed by the defendant or by some other person, whether his servant, or an independent contractor, whom he employed in its construction. The absence of liability for a latent defect which could not have been detected by the exercise of reasonable care, was explicitly affirmed.

These decisions have been followed and the principles enunciated have been applied in a great number of cases involving a great variety of circumstances. A very concise review of a number of the leading cases will be found in the judgment of McCordie, J., in *Maclean v. Segar*, [1917] 2 K.B. 325. This decision is repeatedly referred to as an authority in more recent editions of the text-books. The rule that the invitor or carrier shall not be liable for injuries resulting from a break-down in the railway carriage or bridge, or exhibition stand, or stairway, or other place to which the plaintiff secured admission by payment of a fee, in consequence of a latent defect, has been repeatedly affirmed, and, in

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so far as I have been able to ascertain, has not been questioned even by any text-writer.

That principle, in my view of this case, affords a complete defence to this appellant Solman, as it is admitted by all parties that the breaking of the shaft was due to a latent defect which could not have been detected either by the defendant himself or by his servants, or by the manufacturer from whom he procured the machine. It was frankly admitted even by the expert, Corman, who was called on behalf of the plaintiffs, that, had this shaft not broken, the plaintiffs would not have been in any danger; but this witness proceeds to state, in effect, that the defendant should, by installing an emergency brake, have provided for an emergency which would arise in consequence of the existence of the latent defect which could not have been discovered (*vide* p. 28, lines 23-33, in answer to the trial Judge). In other words, notwithstanding the unquestioned rule that the defendant shall not be liable by reason of any injuries sustained through the existence of the latent defect, yet he proceeds to make him liable because he did not provide against the consequences of the machine breaking down by reason of such defect. Otherwise expressed, the defendant is to be liable because he did not anticipate and provide against the latent defect which the law says he could not be expected to anticipate. In my opinion, the existing state of the law will not impose liability on any such ground.

It is also quite clear from the evidence of this witness, as well as from the testimony of eye-witnesses, that the plaintiffs and other passengers were in no danger, the machine having stopped of itself, until the operator and others "man-handled" the machine and forced it on. In so doing the jury have not found them guilty of negligence, though invited to do so. The operator, Case, did not know that the brake would not work until after the machine had been "man-handled" and he had stepped back to apply the brake. As the seats below had been emptied, the weight of the passengers on top, once the machine was pushed ahead, brought on the catastrophe, apparently in a second or so, and it is very doubtful if any other brake could have been utilised, after Case found the existing brake ineffectual, in time to have prevented the accident. Until that time there was no apparent reason for mistrusting the existing brake.

To the suggestion that an emergency brake "would have made

the machine safer (in addition to what has just been stated above), I think the decision in *Toronto Power Co. Ltd. v. Paskwan*, [1915] A.C. 734, as followed and applied by the other Division of this Court in *Elliott v. Toronto Transportation Commission* (1926), 59 O.L.R. 609, affords a sufficient answer.

Upon the argument of the appeal, objection was taken to the course pursued by the learned trial Judge when the jury first brought in answers to the questions which had been submitted to them. It was contended that judgment should have been entered in favour of the defendant upon the answers then given by the jury, and, if the appeal were not disposed of upon another ground, this contention by the defendant's counsel would seem to me to require very careful consideration. I am not at all convinced that, of itself, it would not be a sufficient ground upon which to allow the appeal. In view, however, of the opinion already expressed upon the other point, I do not express any definite view upon this feature of the case, merely referring to it as meriting attention in the event of the case going further.

With regard to the view expressed by Hodgins, J.A., that this Court might uphold the plaintiffs' judgment upon a ground of negligence not found by the jury, I am, with great respect, unable to concur in that opinion. It seems to me that this Court is precluded from so doing by a long line of decisions binding upon us. The effect of these decisions, as I understand them, is to hold that where the jury are properly directed in respect of different grounds of negligence raised at the trial, and upon which they are invited by the plaintiff to find the defendant liable, and the jury find the defendant negligent upon one or more of such grounds only, they thereby negative negligence in respect of the remaining grounds presented to them. For an appellate court, under such circumstances, to find the defendant liable upon any of the grounds of negligence thus impliedly negated by the jury, is deemed to be in effect a finding inconsistent with the verdict which the jury had given, and therefore not within the province of this Court as stated in the rule of practice which was subsequently embodied in sec. 26 of the Judicature Act.

In the present case the grounds of negligence put forward by the plaintiffs are stated in para. 6 of the statement of claim, namely:—

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- App. Div. (a) In not providing a proper safety device for passengers in  
 1931. the seats or cars.  
 BALNE (b) An emergency brake.  
 v. (c) A competent engineer in charge.  
 SUNNYSIDE (d) Not removing the plaintiffs from the seat while it was  
 AMUSEMENT Co. LTD. suspended in the air.  
 Grant, (e) In pushing forward and causing the wheel to move with  
 J.A. such sudden motion, by the defendants or their servants or work-  
 men.

Evidence was given at the trial with reference to all of these alleged grounds of negligence, and the jury were fully instructed and directed by the learned trial Judge in reference to them. The jury, as appears at the foot of p. 532 and top of 533, found one ground of negligence only, namely, the omission to supply an emergency brake.

Under these circumstances, in view of the directions and instructions given to them by the trial Judge, I think it is not open to this Court to find against the defendant upon any other of the grounds which were presented to the jury, and upon which they were invited to find the defendant negligent, but declined to do so.

In addition to the *Andreas* case, 37 Can. S.C.R. 1, referred to by Hodgins, J.A., I find that the same view was expressed by Duff, J., in *Canadian Pacific Railway Co. v. Ouellette*, [1924] S.C.R. 426.

In this Province the former Court of Appeal laid down the same rule on more than one occasion: *McGraw v. Toronto Railway Co.* (1908), 18 O.L.R. 154, and more particularly in the opinion of Osler, J.A., pp. 162, 163, and Garrow, J.A., pp. 165, 166. In that decision the Court of Appeal reversed a Divisional Court on this very point. So also, our former Court of Appeal under the late Sir Charles Moss, in *Paquette v. Grand Trunk Railway Co.* (1911), 2 O.W.N. 1133, 19 O.W.R. 305, at p. 307; see also the present Divisional Court in *Hendrie v. Grand Trunk Railway Co.* (1921), 51 O.L.R. 191, and in *Westenfelder v. Hobbs Manufacturing Co.* (1925), 57 O.L.R. 31.

The same rule was recognised by the Court of Appeal in England in the case of *Lloyd Brothers v. Woolland* (1902), 19 Times L.R. 32 (Collins, M.R., at pp. 32 and 33).

I venture the opinion, therefore, with great respect, that the question has been so well settled, and for so long a period, that

this Court is not in a position to adopt any other practice in the present case. App. Div.

I concur in the opinion of my brother Middleton as to the disposal to be made of the appeal. 1931.

*The Court being divided, appeal dismissed with costs.*

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*Bankruptcy—Claims upon Surplus Proceeds of Sale of Shares by Pledges of Bankrupt Broker—Wrongful Conversion of Shares of Customers—Failure to Identify Particular Shares—Fund Distributable in Bankruptcy Proceedings, Subject to Equitable Rights of Claimants—Powers Exercisable in Bankruptcy—Prejudice of Provincial Law—Powers of Parliament.*

At the time of the bankruptcy of W. Ltd., a stockbroking company, it owed large sums to two stockbroking firms, secured by the transfer to them of shares of stock controlled by the bankrupt company, but in reality the property in whole or in part of its customers. Each of the firms sold all the shares they thus held, and, after paying themselves all that was due to them, a surplus remained with each of them, which was paid by them to the trustee in bankruptcy of the property of W. Ltd. Certain customers of W. Ltd. made claim to part of this surplus, contending that they could identify as theirs part of the stocks that had been sold, and that the money due by W. Ltd. to the two stockbroking firms must be deemed to have been taken by them from that portion of the stocks sold which was owned by W. Ltd., and that the surplus, which exceeded the value of the claims, must now be deemed to represent that portion of the proceeds of the stocks which was not actually owned by W. Ltd.

Upon appeal from orders giving effect to this contention and requiring the trustee to pay over to these particular customers the amount realised with respect to the stocks which they claimed to own, it was held, by the majority of the Court, that the claimants had not satisfactorily identified any stock as being theirs; the claimants failed to establish their claims because they had not proved ownership; the surplus fund remained in the hands of the trustee to be distributed as part of the general estate of the bankrupt, subject only to any equitable right that any claimant might succeed in proving; and the matter must be dealt with in Bankruptcy.

If the claimant S. could shew that shares bought for him were converted and that the proceeds of the conversion went in reduction of a balance charged upon other stocks which should have been first resorted to, and that those stocks were when the final sale took place benefited by this, then, subject to the right of others to share, S. would have the right to a preference.

*Per HODGINS, J.A. (dissenting):*—As the fund on which the claimants are making a claim is not part of the property of the debtor, and as their money and securities have been disposed of in such a way

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as to give them a right to be heard in a forum where their rights can be properly determined and equity done between them and other claimants, it is the duty of the trustee to pay this money into the Supreme Court, to be there distributed. That Court may appoint representatives of classes of creditors whose rights arise out of similar facts—but in Bankruptcy there is no power to do so. The Dominion Parliament has not the power to deal, to the prejudice of provincial law, with the property and civil rights of the claimants and others to a fund such as this.

APPEALS by the trustee in bankruptcy of the property of Wiggins Ltd. from an order of the Registrar and one of an Assistant Master, allowing the appeals of the claimants from the disallowance by the trustee of claims for delivery to the claimants of certain shares of the capital stock of Falconbridge Mines Ltd. and International Nickel Company.

The appeals were heard before KELLY, J., sitting in Bankruptcy.

*H. A. Aylen*, for the trustee.

*Alastair Macdonald*, for the claimants.

December 31, 1930. KELLY, J.:—In the Travers case the appeal is from an order of the Registrar in Bankruptcy of the 9th October, 1930, by which he allowed the appeal of the claimants from the disallowance by the trustee in bankruptcy of Wiggins Ltd. of their claims for delivery to them of certain shares of the capital stock of Falconbridge Mines Ltd.

The principal facts appearing from the material have been set out in the Registrar's reasons for judgment, and need not be repeated here. I desire, however, to draw attention to the fact that, though the Registrar at one place states that the trustee in bankruptcy, acting on the direction of the inspectors, instructed the pledgees of the shares (West & Co.) to sell all the stocks in their hands, including those of the applicants, it is apparent from the evidence of the trustee that one of the inspectors, namely F. J. Travers, who is also one of the claimants, did not join in authorising such sale.

The position appears to have been that the debtor (the broker) purchased for the respondents (in different amounts for each of them) 200 shares of the capital stock of Falconbridge Mines Ltd., on the terms set forth in the Registrar's reasons; that, subsequent to the debtor's assignment on the 1st February, 1930, and prior to the sale of this stock upon the instructions of the trustee, the

respondents made demand upon the trustee for delivery of the shares upon payment of the balances due by them respectively upon their purchases; and that these demands were not complied with and the stock was sold accordingly, and the surplus proceeds paid to the trustee. It appears also that during these proceedings the respondents, through their counsel, abandoned their demand for delivery of the stock, but claimed to rank in priority to all other creditors for the full value of the shares at the time of the sale thereof by West & Co. upon payment to the trustee of the said balances of unpaid money.

The legal rights of persons in the position of the claimants have been dealt with in many decided cases and by text-writers. In *Re Stout and City of Toronto* (1927), 60 O.L.R. 313, the late Mr. Justice Ferguson, at p. 320, referred to the fact that in *Clarke v. Baillie* (1911), 45 Can. S.C.R. 50, Mr. Justice Anglin, now Chief Justice of Canada, pointed out that the business of stock-brokers in this country is conducted in a manner much more closely resembling that which prevails in the United States than that which obtains in England, and therefore that the United States authorities are more applicable than the English authorities. Mr. Justice Ferguson then said (p. 321) that, after a careful consideration of the judgments in several Canadian cases which he then mentioned, he was led to the conclusion that the law of this Province in respect of the relationships arising out of a transaction in stocks on margin is accurately and concisely stated in quotations which he there made from three well-known text-writers. As these quotations have definite application to the facts of the present case, I repeat them here:—

(1). 9 Corpus Juris, at p. 542: "A broker who has advanced the purchase-money to a client desiring to buy stock has the right to take the title in his own name . . . Ordinarily, however, the title to stock bought by a broker for a client on margin or otherwise, whether purchased in his own name or not, vests in the client, subject, however, to a lien for the payment of advances and commission due the broker, he being regarded as a pledgee of the stock."

(2) Jones on Pledges, 2nd ed., para. 496 (also in 3rd ed., p. 589): "The broker acts in a threefold relation: first, in purchasing the stock, he is an agent; then, in advancing money for the purchase, he becomes a creditor; and, finally, in holding the stock

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to secure the advances made, he becomes a pledgee of it. It does not matter that the actual possession of the stock was never in the customer. The form of a delivery of the stock to the customer, and a redelivery by him to the broker, would have constituted a strict, formal pledge. But this delivery and redelivery would leave the parties in precisely the same situation they are in when, waiving this formality, the broker retains the certificates as security for the advance. The contract is in spirit and effect, if not technically and in form, a contract of pledge, and is governed by the law of pledges."

(3) Dos Passos on the Law of Stockbrokers and Stock-Exchanges, 2nd ed., p. 205: "We have already seen what the relation is where a stockbroker contracts to buy stocks for a client on a margin for speculation, and advances all or the greater portion of the purchase-money, and that, after such purchase, the broker immediately acquires a lien upon the stock, for the balance of the purchase-money in excess of the margins received, which he has advanced to pay for the stocks, and becomes, in relation thereto, a pledgee, with the full powers and responsibilities of that position."

At p. 804: "Where the broker advances the money to pay for the stock which he is employed to purchase, he stands in the position of pledgee of the stock so purchased, and may hold the same till his advances are paid, as we have seen in another connection."

In *Re Bolling* (1906), 147 Fed. Repr. 786, the decision was that a stockbroker who purchases and carries stocks on account of a customer on margins furnished by such customer holds the same as pledgee, and on his bankruptcy the customer is entitled to the stock on payment of the amount due thereon, or to the surplus realised from its sale by the trustee, to the exclusion of the bankrupt's creditors.

I refer also to *Markham v. Jaudon* (1869), 41 N.Y. 235, and the comments thereon at pp. 181 and 182 of the 2nd edition of Dos Passos on Stockbrokers.

The remarks of Mr. Justice Duff in *Clarke v. Baillie*, 45 Can. S.C.R. at p. 66, are also relevant.

The respondents would have been within their rights had they demanded from the debtor prior to the assignment the delivery of the stock on payment of the balances referred to, and they were also within their rights in making, as they did make, a similar demand upon the trustee after the assignment; and they could not

be deprived of that right by the sale of the shares by, or on instructions of, the trustee, unless with their consent; and upon the law and the facts as already indicated the inspectors could not confer upon the trustee power to deprive the respondents of that right. The shares were sufficiently identified; no difficulty arises on that score.

My opinion is therefore that the respondents were entitled to the remedy directed by the Registrar. I do not understand that the amounts set forth in the formal order of the Registrar now appealed against are questioned or objected to and I therefore do not enter into a calculation thereof.

The appeal, in my opinion, should be dismissed with costs.

In Spratt's case, the Assistant Master has stated that the facts are not in dispute; on the argument before me no objection was taken to that. Spratt's purchase of the 100 shares of International Nickel which became the subject of these proceedings was made on the 5th November, 1929, and on that day a bought note was issued to him by the broker (Wiggins Ltd.) On the 6th November, payment therefor was made, the broker having on that date charged the price of the stock against Spratt's large cash credit then in its hands; and the shares then appear as his in the broker's books of account. As between them the shares were then paid for in full. He not having then or thereafter given any authority to use or pledge these shares, they remained his; and they were regarded and referred to as "Spratt's Nickel" and could be identified as his.

On these and the other facts stated by the Assistant Master, I am of opinion that upon the law applicable thereto his conclusions were correct. The appeal should, therefore, be dismissed with costs.

The trustee in bankruptcy appealed from the orders of KELLY, J.

February 24 and March 24 and 25. The appeals were heard by MULLOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*The Hon. N. W. Rowell, K.C., and H. A. Aylen, for the trustee in bankruptcy.* By reason of the wrong doing of Wiggins Ltd. in buying 100 shares of International Nickel stock for Spratt on margin and not paying for it, the amount of the price of these shares was added to the burden to be borne by the other customers whose stock was pledged with Moysey & Co. on margin. There-

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fore the proceeds of this fund must be distributed *pro ratâ* amongst all the customers whose stock was so pledged: *In re Belleau* (1929), 11 C.B.R. 383; *S.C., sub nom. Grondin v. Lefavre*, [1931] S.C.R. 102. Spratt, on the evidence, is a simple contract creditor, and to give him these shares as claimed would be to give him a preference within the meaning of the Bankruptcy Act. If he is entitled to share it is only with the other customers whose stock was sold. The learned Judge has disposed of the Travers claims without regard to the fact that others might have a claim on the fund. The judgment should recognise all claims on the fund and direct their payment in accordance with the respective priorities of the different classes.

*Lewis Duncan*, for O. C. Spratt, respondent. The purchase by Wiggins through Moysey on the 17th January of the 100 shares claimed gave to Wiggins an equitable interest in the shares which brought them within sec. 23(1) of the Bankruptcy Act, being trust property outside of the operation of the Act. *In re Belleau, supra*, distinguished. Reference to *New Prince & Garrard's Trustee v. Hunting*, [1897] 2 Q.B. 19, at pp. 31, 32. It is a question of fact whether appropriation was made of the shares to Spratt's account: *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231, at p. 254; *Bailey v. Culverwell* (1828), 8 B. & C. 448, at pp. 453-5; *Ex p. Sayers* (1800), 5 Ves. 168; *Re Carson* (1924), 55 O.L.R. 649, 4 C.B.R. 683; *Sharp v. Jackson*, [1899] A.C. 419. As these shares were bought for Spratt, the trustee must be as honest as the bankrupt debtor, and cannot deprive Spratt of his security. Reference to *In re Tyler*, [1907] 1 K.B. 865, at p. 873; *King v. Hutton*, [1900] 2 Q.B. 504; *In re Thellusson*, [1919] 2 K.B. 735; *Re Bell* (1908), 99 L.T.R. 939; *Re Woodd* (1900), 82 L.T.R. 504; *Conmee v. Securities Holding Co.* (1907), 38 Can. S.C.R. 601, at p. 616; *Re Mills* (1908), 125 N.Y. App. Div. 730.

*M. L. Gordon*, K.C., *G. F. Adams*, and *W. M. Gordon*, for creditors claiming some interest in the fund in the hands of the trustee in bankruptcy. This class of creditors can identify securities in the hands of the debtor, i.e., securities which were deposited as collateral. So far as they can identify their property they are entitled to receive it back. If that is impossible they are entitled to receive the proceeds as against creditors whose securities cannot be identified: *Sinclair v. Brougham*, [1914] A.C. 398. This fund should not form part of the bankrupt estate: *In re Guardian*

*Permanent Benefit Building Society* (1882), 23 Ch. D. 440; *Mutton v. Peat*, [1900] 2 Ch. 19; *Haggart v. Trusts and Guarantee Co. Ltd.* (1930), 65 O.L.R. 23; *Skiff v. Stoddard* (1893), 63 Conn. 198; *In re Burge Woodall & Co.*, [1912] 1 K.B. 393; Dos Passos on Stockbrokers, 2nd ed., vol. 1, p. 287.

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*Alastair Macdonald*, for F. J. Travers, Robert Travers, and Blanche D. Travers, respondents. The group who bought shares on margin, but who cannot trace their securities which were sold by West & Co., are entitled to share as a class to the extent that the fund is increased by such sale: Campbell on the law of Stockbrokers, 3rd ed., pp. 93 and 97. They are content to have the judgment varied so as to include all others in the same class in the same relief as that granted to the Traverses. Customers seeking to recover their securities or the proceeds thereof must identify the securities: *Skiff v. Stoddard*, *supra*. Where such identification has been established, those creditors rank ahead of the others who cannot identify their stock: *Re Bryant Isard & Co., Ex p. Fair* (1922), 22 O.W.N. 402, 2 C.B.R. 471, 23 O.W.N. 113, 3 C.B.R. 840; *Re Bryant Isard & Co., Ex p. Turner* (1926), 29 O.W.N. 167, 7 C.B.R. 44. Customers whose securities have been wrongfully pledged have an equity in priority to those whose securities have been properly pledged: *Haggart v. Trusts and Guarantee Co. Ltd.*, *supra*.

*Rowell*, K.C., in reply. Appropriation to be effective must be irrevocable: *Taylor v. London and County Banking Co.*, *supra*. There is no evidence of such appropriation as claimed on behalf of Spratt. Speculators, i.e., customers who purchase from day to day, are ordinary creditors: *King v. Hutton*, *supra*.

June 15. MIDDLETON, J.A.:—At the time of the bankruptcy Wiggins Ltd. owed Moysey & Company a large sum secured by the transfer to that company of shares of stock controlled by the bankrupt. This stock, it is said, was not actually owned by the bankrupt, but in truth belonged to various customers.

The bankrupt also owed a large sum to West & Company, and this was similarly secured by other stock hypothecated to West & Company by the bankrupt. This stock, it is also said, did not in truth belong to the bankrupt, but had been purchased by it for its customers.

Moysey & Company and West & Company each sold all the

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stock they held, and, after paying themselves all that was due to them, a surplus remained with each of them. These surpluses were paid by them to the trustee in bankruptcy.

Certain customers of the bankrupt, Spratt and the three Traverses, made claim to part of this surplus, their contention being that they could identify as theirs part of the stock that had been sold and that upon principle the money due by the bankrupt to Moysey and to West must be deemed to have been taken by them from that portion of the stock sold which was owned by the bankrupt, and that the surplus, which exceeded the value of the claims put forward, must now be deemed to represent that portion of the proceeds of the stock which was not actually owned by the bankrupt. This claim has been given effect to, and the trustee has been ordered to pay over to these particular customers the amount realised with respect to the stock which they claim to own. From this order the present appeal is had.

If, in truth, the claimants have been able to identify the stock which was sold as their stock, and if the possible claims of all other customers in the like position can be ignored, this is all very well. There is, however, no room for the suggestion that the claims of Spratt and the Traverses can be preferred to the claims of others in precisely the same situation.

The case as presented in the Court below was exceedingly defective—the actual facts were by no means satisfactorily proved. Upon this appeal affidavits have been put in from time to time and at all times, even after judgment was reserved. These affidavits do not in all respects clarify the situation. They are hard to understand and in some respects impossible to reconcile. They, however, demonstrate the extreme difficulty of any attempt to shew that any of the stock sold by either Moysey or West can be said to be stock owned by any particular individual customer of the bankrupt company, and, in particular, it is plain that neither Spratt nor the Traverses have satisfactorily identified any stock as being theirs.

The foundation of the whole doctrine which is sought to be invoked is, I think, the wrongful conversion of a customer's stock by some dealing between the insolvent broker and Messrs. Moysey and West. There is a suggestion that the basis of the transaction between the bankrupt and its customers was some understanding or arrangement by which the bankrupt was to be at liberty to pledge its customers' stock as collateral to advances made by these

firms. If this is so, it would afford an additional answer to the claim.

The law is simple in its principle but difficult in its practical application. Where the insolvent hypothecates stock which is not his own and stock which is his own for his own purposes and without the authority of the client, the proceeds of the stock which he owns or has a right to discount must be applied first in the discharge of the debt, and those who have been wronged by the tortious act of the insolvent are entitled to claim that that which remains, after satisfying the claim against all the stock, must be in the first place regarded as the proceeds of the stock wrongfully converted. If the claims based upon wrongful conversion exceed the balance available, all such claims will rank *pro ratâ* upon the surplus available. The Court will not attempt to discriminate as between these preferred claimants and accord to one priority over the others. In order to invoke this principle, ownership of the stock sold must be satisfactorily proved by the claimants as well as the fact of its wrongful conversion. Here the claimants fail, in my opinion, because they have failed to prove ownership, and the surplus fund remains in the hands of the assignee to be distributed as part of the general estate of the bankrupt unless some other claimant can successfully establish a claim thereto.

If this is correct, it follows that the matter must be dealt with in Bankruptcy and not otherwise. So far as these cases are concerned, the fund is distributable as part of the bankrupt's assets in the bankruptcy proceedings. The trustee in bankruptcy holds it as an asset in the bankruptcy, subject only to any equitable right that any claimant may succeed in proving.

I would allow the appeal but under the circumstances I would not give any costs either here or below.

There is another way in which the case of Spratt might have been presented. He may be able to shew that the 100 shares bought for him were converted on the 6th November, and if it can be shewn that the proceeds of this conversion went in reduction of a balance charged upon other stocks which, upon the principle indicated, should have been first resorted to, and that these stocks were when the final sale took place benefited by this, then, subject to the right of others to share, Spratt would have the right to a preference. Upon the reference Spratt should have the right notwithstanding this judgment to make any such claim if so advised.

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In the proceedings it is suggested that the trustee in bankruptcy when he received this fund was not content with retaining it for distribution but invested it in stocks which have depreciated. If this is so, the matter should be inquired into in the bankruptcy proceedings.

MULOCK, C.J.O., and MAGEE and GRANT, JJ.A., agreed with MIDDLETON, J.A.

HODGINS, J.A.:—The relevant facts of the Spratt case may be shortly stated. On the 5th November, 1930, the bankrupt company bought for Spratt 100 shares of International Nickel for \$3,480, through West & Co., stockbrokers, and charged his account with this sum. Spratt had a credit balance with the company of \$26,484.92, as per their monthly statement of the 30th November, 1930 (exhibit B. in Spratt's affidavit of the 19th May, 1930), and, after charging up the \$3,480, a net balance of \$23,123.97 was left. On the 31st January, 1931, another monthly statement of that date to Spratt shewed a credit entry of \$25, being a dividend on 100 shares of International Nickel, and a balance of \$23,266.95. The entries in the company's books consistently shew an appropriation of 100 shares of International Nickel to Spratt's account down to the assignment in bankruptcy on the 1st February, 1931; and, so far as it could do so by entry in its books, it has indicated that it held 100 shares of International Nickel on Spratt's account.

It is not, I think, necessary to trace the dealing of the company with this or any other 100 shares of International Nickel, but it should be stated that the shares so bought on the 5th November, 1930, were not acquired by the company until on or about the 29th December, 1930. Immediately on getting these shares they were handed over to Moysey & Company, stockbrokers, in settlement of a sale made by Moysey & Company, on instructions of the company, of 100 shares of International Nickel.

This sort of transaction was repeated on the 8th and 17th January, 1931, evidently so that the company might seem to have ready for Spratt his 100 shares, so that on the date of the assignment Moysey & Company did hold 100 shares of International Nickel for the account of the bankrupt company. These shares were afterwards sold by Moysey & Company by instruction of the trustee on the 20th to the 25th February, 1931, with other stocks and collaterals, producing in all \$20,828.22, of which \$3,790

represented the amount received from the sale of the 100 shares of International Nickel. Competing claims are now set up by other creditors, whose shares or collaterals were thus sold, to share in the balance paid over by Moysey & Company to the trustee, namely, \$4,788.12. These claims vary greatly, depending on the state of the account between each individual creditor and the bankrupt, and marshalling and other equitable doctrines of various kinds are set up as entitling each one to share according to his rights based on his own individual transaction. But all contend that the moneys received by the trustee are not the "property of the debtor" under sec. 23 of the Bankruptcy Act, but belong to the creditors whose stocks and collaterals were rightly or wrongly pledged by the bankrupt in its dealings and were afterwards sold, on the instructions of its trustee in bankruptcy. In this I think the creditors are right, and for that reason I am of opinion that the trustee has no right to claim that the moneys in his hands, originating in the way I have stated, should be distributed by him as part of the bankrupt's assets. It should be paid into the Supreme Court and distributed by it, having regard in the case of each claimant to such rights as arise out of or by reason of the dealing of the bankrupt company with each individual creditor.

I do not think that, under the Bankruptcy Act, these competing claims to such a fund can be adjusted in bankruptcy or on the application of the trustee. The latter's rights and duties depend wholly on the terms of that Act, and these may be summed up, roughly, as confined to ascertaining, acquiring, and distributing the debtor's assets. Such a situation as this is not covered by those duties.

In the first place the bankrupt company was not the owner of the stocks and collaterals deposited with it. It was a pledgee only, and it, in some cases wrongly and perhaps in others rightly, re-pledged them with the stockbrokers with whom the company dealt. Their sale could in no way alter the ownership of those securities.

In *Re Stout and City of Toronto*, 60 O.L.R. 313, will be found extracts from 9 Corpus Juris, p. 542, Jones on Pledges, 2nd ed., para. 496, 3rd ed., p. 589. and Dos Passos on the Law of Stockbrokers and Stock-Exchanges, 2nd ed., pp. 205 and 804 (quoted by Kelly, J., in the Travers case), which fully justify the following statement taken from Corpus Juris:—

"A broker who has advanced the purchase-money to a client

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desiring to buy stock has the right to take the title in his own name . . . Ordinarily, however, the title to stock bought by a broker for a client on margin or otherwise, whether purchased in his own name or not, vests in the client, subject, however, to a lien for the payment of advances and commissions due the broker, he being regarded as a pledgee of the stock."

In *Ellis & Co.'s Trustee v. Dixon-Johnson*, [1925] A.C. 489, Lord Cave, L.C., said in the House of Lords (p. 492):—

"The effect of the bankruptcy was to close the account which had been running and to transfer the rights of the brokers to the trustee in their bankruptcy. But the rights of the trustee were no larger than had been the rights of the brokers and were subject to the like condition as to the return of the securities."

The relation of the broker and his customer is that of principal and agent, and the broker's purchase was made as agent for the customer; and pledging, rightly or wrongly, the property of the customer, his principal, did not alter that relationship. When the sale of all the pledged property, including that of Spratt, took place, the resulting proceeds were the salvage out of a large number of transactions which dealt with the property, not of the bankrupt, but of the customers, and the amount so salvaged does not therefore appear to me to be the property of the debtor or to be distributable as such by his trustee.

In the second place, while the creditors who are setting up claims to this fund clearly have each an action against the bankrupt company, for damages for conversion, or on the case, and a right now to prove against the bankrupt estate, this application is designed, in effect, to ascertain what equities exist in favour of each creditor in the salvaged sum referred to, moneys which belong to them as being derived from the sale of their securities. These are matters in which the trustee for the bankrupt company has neither the right to concern himself at the expense of the estate, nor any interest to intervene or to argue for or against any claimant. The rights of the parties are derived from the original transactions coupled with the subsequent actions of both the bankrupt and the customers who are now creditors (such as tender, etc.) These rights are not easy of solution and must be fully considered, in connection with the special circumstance that stocks identical with those of the customers are and were purchasable in the open market in each case. The effect of

this is pointed out and discussed in the *Dixon-Johnson* case in the Chancery Division, [1924] 1 Ch. 342, and in the Court of Appeal, [1924] 2 Ch. 451.

The case of *Grondin v. Lefavre*, [1931] S.C.R. 102, was referred to on the argument and a translation of the judgment has since been furnished. It seems to support the view I take. Rinfret, J., there says (p. 112):—

“There, the least that can be said is that this right (i.e. to the proceeds of a thing pledged and sold) belongs to all clients of Belleau whose shares have been sold under the same conditions as those of the appellant and the proceeds of which sale contributed to the formation of the common indivisible fund. We do not care to pronounce judgment thereon, because it would not be equitable that in this case, where the rights of Grondin alone have been under discussion, the judgment should determine questions in which all the other creditors of Belleau might have been interested.

“There is, however, one certain fact, and that is that the money coming from Post & Flagg is insufficient to pay all the creditors who are in the same position as the appellant. To recognise, as he asks in his petition, his right to be paid from these very funds the whole amount of his claim, would be to give him a preference while at the same time his co-creditors could not receive more than a part of their due. In other words, this would be to authorise precisely what the Bankruptcy Act was designed to prevent. The appellant runs up against the material fact that his debtor is in bankruptcy and that all those who are in his position ought to be treated alike.”

One of the added parties referred to sec. 152 of the Bankruptcy Act as justifying the action of the trustee in his intervention and the right of the Bankruptcy Court to settle the claims to this money *inter se*. I do not agree in this contention. Section 152 itself describes the jurisdiction of the Court invested with original jurisdiction by the Bankruptcy Act. It is as follows:—

“The following named courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorised by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers,—

“(a) In the provinces of Alberta, British Columbia, Nova

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Scotia, Ontario and Prince Edward Island, the Supreme Court of the province."

This section gives such jurisdiction at law and in equity as will enable the named Courts "to exercise original, auxiliary and ancillary jurisdiction in *bankruptcy* and in other proceedings *authorised by*" the Bankruptcy Act.

"Court" is defined in sec. 2(1) as meaning that tribunal "which is invested with original jurisdiction in bankruptcy under this Act," and from the definition in sec. 23 of the "property of the debtor" is excluded what is held in trust by the debtor, but included what may belong to or be vested in him when the petition is presented.

The original jurisdiction of the Court of Bankruptcy, generally speaking, is supervisory, the actual investigation, settlement, and distribution of the debtor's estate being done by the trustee, whose duties are prescribed by sec. 39 *et seq.* These powers, and the jurisdiction of the Court, are both predicated on the assumption that the estate being administered is that of the debtor, as is the Bankruptcy jurisdiction in England, where, however, constitutional questions of jurisdiction do not arise. (See *In re Wigzell*, [1921] 2 K.B. 835, 861). By sec. 83 of our Act the bankrupt debtor himself becomes entitled to all surplus after payment of his creditors in full with interest and the costs, charges, and expenses of the bankruptcy, thus indicating clearly what is and what is not to be administered by the trustee. There is nowhere found any right in the trustee to intermeddle with the rights *inter se* of claimants against the estate or otherwise: *cf. Prout v. Gregory* (1889), 24 Q.B.D. 281, *In re Frost*, [1899] 2 Q.B. 50, and *Spence v. Coleman*, [1901] 2 K.B. 199. By secs. 74 and 123 provision is made for the payment of dividends on the basis that "all debts proved . . . shall be paid *pari passu*."

This last provision was considered by this Court in *Re Orzy* (1923), 53 O.L.R. 323, and the rule laid down was that in bankruptcy the rule of equality among creditors' claims was absolute, except where the Bankruptcy Act itself gave a priority and that the adjustment of the rights of creditors *inter se* was not within the power of the trustee or the Court. Ferguson, J.A., in that case said:—

"I agree in the result suggested by my brother Hodgins, but rest my judgment on the ground that the practice in bankruptcy

does not permit of the adjustment of the rights and privileges of creditors *inter se*, but only the claims, rights, privileges, and preferences of creditors as against the insolvent and his estate. That, I think, is the effect and meaning of subsec. 5 of sec. 51 of the Bankruptcy Act, and of such cases as *Ex p. Pottinger* (1878), 8 Ch. D. 621, and *In re Frost*, [1899] 2 Q.B. 50, 52, the reason or principle governing being that a bankruptcy proceeding is designed to administer the rights of creditors of the estate as against the debtor and his estate, and therefore the Court may not in that administration be delayed or hindered by being called upon to determine questions between creditors or between a creditor and another person such as the assignee of the creditor, or, as here, a question as to whether or not one creditor is estopped from taking a dividend from the insolvent estate to the prejudice of another."

I have come to the conclusion that, as the fund on which the applicant Spratt is making a claim is not part of the property of the debtor, and as it is clear that the applicant's money and securities have been dealt with or sold and disposed of in such a way as to give him a right to be heard in a forum where his rights can be properly determined and equity done between himself and other claimants, it is the duty of the trustee, and he should be so ordered, to pay this money into the Supreme Court, to be there distributed. It may be that that Court can appoint representatives of classes of creditors whose rights arise out of similar facts. But I do not see any power in this Court so to do, nor in the Registrar of the Bankruptcy Court (see sec. 159).

There is another reason that occurs to me as having great weight. In the case of *Biddle v. Bond* (1865), 6 B. & S. 225, it was established that a bailee is estopped from disputing his bailor's title, unless he claims to defend under the party in whom he alleges the title to be. In this case the trustee cannot set up against Spratt the title of any other claimant, as he professes to dispute them all, nor does he claim to do so, but merely to stand by, so as to fall heir to any unclaimed sum of money for the general creditors, whose right to it he cannot even plausibly assert.

I do not think that the Dominion Parliament has the power to deal, to the prejudice of provincial law, with the property and civil rights of the applicant and others to a fund such as this. To construe the words "auxiliary or ancillary" so as to embrace such an application as this would be to add something not in any sense

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auxiliary or ancillary to bankruptcy legislation, for confessedly it would be dealing with a fund not the property of the debtor but of the principals for whom the debtor acted as agent. I see nothing in the Bankruptcy Act which in any way aids such a construction, and I do not believe the Bankruptcy legislation was ever intended to cover a case like this.

The order in appeal should be set aside and the trustee directed to pay the money in his hands into the Supreme Court, the costs heretofore incurred to be in the discretion of the Judge of that Court who distributes the fund.

I have had, since writing the above, the advantage of reading my brother Middleton's opinion. Apart from my view that the stocks sold were those bought by the bankrupt as agent for his clients and that the small residue or salvage can only belong to them and not to his estate, I would be inclined to agree that, if all are simple creditors of the bankrupt, the distribution must necessarily be *pari passu*. But no satisfactory opportunity has been given in this or the Travers case to establish the ownership of each block of stock purchased, pledged, and sold. The appearance of several counsel to represent the various points of view of certain claimants against the fund in no way helps the Court to decide what those rights are or may be or whether they have any legal existence. That can only be decided on the facts of each particular claim. I, therefore, do not think it wise to lay down as the law that all those who lost money through Wiggins Ltd., no matter under what circumstances, and without going into their relative claims carefully, are only simple contract creditors on the bankrupt estate. For these reasons I am not able to concur in the allowance of these appeals in the way suggested by my learned brother.

The Travers case, while differing slightly in the facts, seems to me to raise the same initial question discussed in the Spratt case. The three claimants, F. J. Travers, Hubert Travers, and Blanche D. Travers, bought through Wiggins Ltd., on margin, Falconbridge Mines stock, 25,100, and 75 shares respectively. At the date of the assignment in bankruptcy they owed Wiggins Ltd. the following, F. J. Travers \$75, H. R. Travers \$379.09, and Blanche D. Travers \$287.66. The stocks so bought were pledged with West & Co., stockbrokers, and were, with others, sold by the trustee, and he has now the proceeds of sale in his hands, some

\$18,700.96, in which other parties similarly placed are claiming a share. App. Div.

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In my view the only order this Court can make in this case is one similar to that proposed in the Spratt case.

It is obvious that if the contentions put forward before us as to the distribution of this fund, and that in the Spratt case, are to be really considered and dealt with, the convenient course is to have the rights of the parties settled on a reference where the complicated facts and the rights arising out of them can be considered in detail. This is not a function of the Bankruptcy Court, but it can readily be done on an application for payment out of court of the fund when a Judge of the Supreme Court can make the appropriate order.

*Appeals allowed (HODGINS, J.A., dissenting).*

#### [APPELLATE DIVISION.]

GUERTIN V. FASSETT LUMBER CO.

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June 15.

*Negligence—Injury to Plaintiff's Horse upon Defendant's Premises—  
Invitee—Unsafe Condition of Way—Evidence—Finding of Trial  
Judge—Failure of Plaintiff to Shew Knowledge of Defendant.*

A person is not liable for damages arising from a dangerous condition which he did not cause, who is ignorant of its existence, and to whom knowledge of its existence cannot be imputed.

The plaintiff was hired with his teams by L., who had a contract with the defendant company to get out logs for use in the company's lumber business. The plaintiff took a team over a private way leading to the company's limits, and in crossing a culvert one of the horses met with an accident. It stepped upon a board which broke under its weight and the horse broke a leg and had to be destroyed. The plaintiff sued for damages, charging negligence in respect of the rotten condition of the board. The trial Judge found that the accident was caused by the board being insufficient to bear the weight of the horse. There was no evidence that the defendant company caused the board to be placed there, or knew or should have known of its presence there or when it was placed there. For all that appeared it might have been placed there but a moment before the accident by some person for whose acts the company was not responsible:—

*Held*, by the majority of the Court, that the plaintiff had failed to prove any negligence of the defendant company which caused the accident; and the action should be dismissed.

*Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, 2 C.P. 311, applied.

*Per* HODGINS and MIDDLETON, J.J.A. (dissenting):—The plaintiff with his horse was lawfully on the way where the accident happened; there was no evidence of inspection of the *locus* by the defendant company; the company should have known its dangerous condition and was liable.

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AN appeal by the defendant company from the judgment of his Honour Judge LEASK, Judge of the District Court of the District of Nipissing, in favour of the plaintiff in an action for damages for the loss of a horse of the plaintiff upon the premises of the defendant company.

May 7. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

*J. M. Bullen*, for the appellant company, contended that the trial Judge erred in holding that the respondent was an invitee. He was merely a licensee, and as such he must take the place as he finds it: *Hayward v. Drury Lane Theatre and Moss' Empires*, [1917] 2 K.B. 899. Assuming that the plaintiff was an invitee, the appellant is not liable. In such a case liability attaches if he knew or ought to have known that there was a hidden danger upon his property. The plaintiff failed to prove that the appellant company did know or ought to have known that the bridge which broke under the horse's weight was dangerous: *W. J. McGuire Co. v. Bridger* (1914), 49 Can. S.C.R. 632, 644.

*J. H. McDonald*, for the plaintiff, respondent. The bridge was not reasonably safe for the purpose for which the appellant invited the respondent to use it, therefore the appellant is responsible for the damages incurred: *Francis v. Cockrell* (1870), L.R. 5 Q.B. 184; *Robert Addie and Sons (Collieries) Ltd. v. Dumbreck*, [1929] A.C. 358. The fact that the bridge was being continually used for the same purpose as the respondent intended to use it entitled the respondent to assume that the bridge was safe.

*Bullen*, in reply, referred to *Westenfelder v. Hobbs Manufacturing Co. Ltd.* (1925), 57 O.L.R. 31, 35.

June 15. MULOCK, C.J.O.—This is an appeal from the judgment of Leask, Judge of the District of Nipissing.

The following are the material facts: The defendant company operated a saw-mill and a few miles of railway leading from its timber-limits to the mill whereby logs were conveyed to the mill. It did not own the right of way, but had been permitted by the Crown to construct the railway on Crown lands for use merely in connection with its lumber business. Thus it was a purely private way, and no one without the company's consent, express or implied, was entitled to enter upon it.

In the autumn of 1929 the company contracted with one Lefleur as a jobber to get out logs for it, and one McGibbon proposed to

the plaintiff that he should, with his teams, hire with Lefleur for the purpose of the work in question, and this the plaintiff did, and on his way with his team to the limits the accident in question happened. He knew of no road into the limits for his teams, except by their walking along the track, and McGibbon consented thereto, and one of the horses, when crossing a culvert of the railway, met with an accident breaking one leg, in consequence of which the horse had to be destroyed. The evidence does not clearly describe the circumstances and conditions which led to this accident, but they appear to have been as follows: When proceeding with the team along the track, the plaintiff reached the culvert, which was about 10 feet wide, over which the track ran, and, leaving one of the horses in charge of a companion, he took the other by the bridle to lead him across the culvert; a hardwood one-inch board, about 4 feet long, lay extended from one tie to another. The horse stepped on this board, when it broke under his weight, resulting in the accident in question. The board was rotten, and the plaintiff charges that, because of its rotten condition, it was insufficient to support the horse's weight, and that the defendant company was negligent in permitting it to be where it was, and therefore was liable in damages for the consequence of such negligence.

I think this case must be decided in accordance with the law as laid down in *Indermaur v. Dames* (1867), L.R. 2 C.P. 311, where, at p. 313, Kelly, C.B., delivered the judgment of the Court affirming the decision of the Court below (1866), L.R. 1 C.P. 274, which was expressed by Willes, J., as follows (p. 288):—

“With respect to such a visitor at least,” that is a person on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, “we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.”

Here the plaintiff at the time of the accident was lawfully on the defendant company's premises for the purpose and at the

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request of the defendant company of promoting business in which both parties were interested and thus was not a mere licensee but an invitee, and he, using reasonable care for his own safety, was entitled to expect that the company would use reasonable care to prevent damage to him from unusual danger which the company knew or ought to have known. Whether the parties exercised reasonable care was a question of fact, and, the case being tried without a jury, it was for the trial Judge to find whether the accident was caused by the negligence of the defendant, and, if so, to specify the act of negligence. His only finding, and the only finding which the evidence warranted, was that it was caused by the board being insufficient to bear the weight of the horse. This finding falls short of a finding of negligence. There is no evidence shewing that the defendant company caused the board to be placed where it was, or knew or should be imputed to know of its presence there or when it was placed there. For all that appears, it might have been placed there but a moment before the accident by some person for whose acts the company was not responsible. Other persons were also driving their horses along the track, and thus had the opportunity of placing the board where it was.

A person is not liable for damage arising from a dangerous condition which he did not cause, who is ignorant of its existence, and to whom knowledge of its existence cannot be imputed.

For these reasons I am of opinion that the plaintiff has failed to prove any negligence of the defendant company which caused the accident, and therefore this appeal should be allowed with costs, and the action dismissed with costs.

MAGEE and GRANT, JJ.A., agreed with the Chief Justice.

HODGINS, J.A.:—The question to be determined here is whether the plaintiff was an invitee or only a licensee. The learned Judge has held that his position was that of an invitee. In this I agree. The evidence, to my mind, establishes an invitation, if not a formal one, yet one to be implied from the circumstances detailed in evidence, and originating in a conversation with Mr. Gibbons, the defendant company's wood superintendent, in which the plaintiff was asked if he could go into the limits with his team to work for Lafleur, a jobber. The plaintiff subsequently accepted and took his horse in by the railway. The way in question was the ballasted railway track leading to the defendant company's lumber

or timber limits, and it was commonly used by the defendant company's jobbers and employees in taking up their horses to the limits. The user was open, well-known, and continuous, some hundred horses, a large number of which belonged to the defendant company, having passed up in the fall of 1929 from August to November, the time of the accident, according to Howard the local manager of the defendant company.

In the case of *Robert Addie and Sons (Collieries) Ltd. v. Dunbreck* (1929), 45 Times L.R. 267, Lord Hailsham describes the duty of an occupier of lands to an invitee who visits premises "by the invitation, express or implied, of the occupier" as being "the duty of taking reasonable care that the premises are safe." Lord Dunedin includes in the description of an invitee a person who is on the land for some purpose in which he and the proprietor have a joint interest.

In this case the proper conclusion is that the plaintiff with his horse was lawfully on the way where the accident happened.

Then did the defendant company know or should it have known of the defect, a one-inch board 4, 5, or 6 feet long, part of the covering over an open culvert about 14 feet wide, over which this board and others were placed on the ties which supported the rails; a board which was so rotten that the horse put his foot through it? His injuries followed during the efforts to extricate him.

The evidence, as I have mentioned, demonstrates knowledge of user by the servants or employees of the defendant company, and it is a reasonable inference that that knowledge involved knowledge of the condition of the way in relation to its use by horses. Is the defendant company chargeable therefor, either as knowing of the defect or because it should have known of it. The evidence is that the defendant company itself was using it for horses, as Howard and Gibbons state, more often than any other way, that 40 to 42 horses crossed over this culvert in the month of October alone, and that the plaintiff himself had used it, and, I judge from the evidence, others too, during 1927, 1928, and 1929. I think that a reasonable inference would be that ordinary care and prudence would suggest that examination would very often be made before valuable horses were led across a rather dangerous break in the solid roadway. There is no evidence of such inspection but I think it more reasonable to conclude that

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the defendant's servants examined the way across the culvert frequently than that they entirely neglected to assure themselves of its safety for their own horses, and in that view I think the defendant company should have known its condition and is liable.

In the result, though the case is close to the line, I would affirm the judgment and dismiss the appeal with costs.

MIDDLETON, J.A., agreed in the result of the judgment of HODGINS, J.A.

*Appeal allowed (HODGINS and MIDDLETON, J.J.A., dissenting).*

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[APPELLATE DIVISION.]

1931.

PANNILL DOOR CO. LTD. v. STEPHENSON.

June 15.

*Mechanics' Liens—Equitable Mortgage—Priorities—Registry Act, R.S.O. 1927, ch. 155, sec. 72—Mechanics' Lien Act, R.S.O. 1927, ch. 173, sec. 20.*

In an action to enforce mechanics' liens, it was found by an Assistant Master that the defendant S. was entitled to priority over the liens with respect to a claim put forward by him as equitable mortgagee of the lands against which the liens were registered:—

*Held*, upon appeal by the lienholders, assuming the transaction to be sufficient to constitute an equitable mortgage, as being in part performance of an implied agreement to give a legal mortgage, that it did not give S. priority: his right was at most an unregistered equitable right, and it conferred upon him no greater right than if he had an unregistered legal mortgage; he acquired no greater right than the equitable mortgagor himself possessed; and the liens, being registered, were entitled to priority.

Section 72 of the Registry Act invalidates an equitable lien "as against a registered instrument executed by the same person;" and it was contended that a registered mechanic's lien is not "executed by the same person;" but neither was the lien claimed by S. executed by the equitable mortgagor or any one else.

By sec. 20 of the Mechanics' Lien Act, when a lien is registered the person entitled to it "shall be deemed a purchaser *pro tanto* and within the provisions of the Registry Act;" so that it is the duty of the Court to adjudge and regard the lienholders as if they were purchasers from the equitable mortgagor, which involves the irrebuttable presumption that the latter executed a conveyance to the lienholders.

AN appeal by lienholders from the judgment of E. W. Boyd, Assistant Master, holding that the respondent A. J. Russell Snow was entitled to priority over mechanics' liens with respect to a claim put forward by him as equitable mortgagee of lands against which liens had been registered.

May 8. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

A. C. McMaster, K.C., and A. O. L. Burnese, for the appellants. The deposit of the documents in this case was not sufficient to create an equitable mortgage. The deposit of a mortgage which has been paid off is not a deposit of a title-deed any more than is the deposit of an expired lease. It is not a link in the chain of title. Sections 71 and 72 of the Registry Act, R.S.O. 1927, ch. 155, apply. Even if an equitable mortgage was created, the respondent Snow acquired no greater rights than his son possessed. If Snow cannot bring himself within the provisions of the statute, it is one equity against another. The liens which arose as early as the 8th May have priority over the equitable mortgage, if such was created, which came into being about the 29th October following.

B. N. Davis, K.C., and J. E. Hare, for the respondent. The claim of Snow is on an equitable mortgage from his son made by parole agreement and by the deposit of the Tisdale mortgage and a discharge thereof. He obtained a lien on those documents which constituted a good equitable mortgage on the property covered by the Tisdale mortgage : Halsbury's Laws of England, vol. 21, p. 74, para. 132; p. 78, para. 140; p. 79, para. 142. Section 73 of the Registry Act does not apply to cut out this equitable lien by the registration subsequently of liens under the Mechanics' Lien Act. Reference to *Thomson v. Harrison* (1927), 60 O.L.R. 484, at p. 487; *Zimmerman v. Sproat* (1912), 26 O.L.R. 448; Halsbury's Laws of England, vol. 21, p. 82, para. 147; *Fenwick v. Potts* (1856), 8 DeG. M. & G. 506.

June 15. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal by lienholders from the judgment of E. W. Boyd, Esquire, Assistant Master, dated the 8th December, 1930, holding that the respondent A. J. Russell Snow was entitled to priority over mechanics' liens with respect to a claim put forward by him as equitable mortgagee of the lands in question.

The lands in question in these proceedings may be conveniently referred to as the lands on the south side of Lonsdale-road. These lands were purchased by Mr. Beaty Snow, son of Mr. A. J. Russell Snow, for the purpose of erecting thereon an apartment-house. Mr. Beaty Snow had theretofore owned lands which may be conveniently referred to as the lands on the north side of the street.

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App. Div. These last named lands he sold to one Richards, taking from him  
1931. a mortgage for \$8,000, being part of the purchase-money. This  
PANNILL mortgage bears date the 1st May, 1928. The lands on the south  
DOOR CO. side of the street were at that time held by Mr. Beaty Snow merely  
LTD. under an agreement of purchase, little having been paid on account  
v. of the purchase-price. He sought to raise money upon the strength  
STEPHEN- of his interest in these properties, and an arrangement was made  
SON. with one Tisdale, embodied in a letter from Tisdale's solicitors  
Middleton, of the 25th May, 1928. Tisdale agreed to advance \$6,000 upon  
J.A. the strength of an assignment of the Richards mortgage for \$8,000  
and of a mortgage upon the land upon the south side of the road.  
This arrangement was carried out on the 30th May, 1928, by an  
assignment of the mortgage and by a mortgage on the lands now  
in question, and about that date Snow began the erection of his  
building.

A large mortgage, \$42,000, was placed upon the property and given priority over Tisdale's mortgage. The mortgagee was to make advances on this mortgage as the building progressed and as he was satisfied that the increased security warranted it. Things progressed none too happily, and Beaty Snow found himself in financial difficulty at the end of October, 1928. He then made an agreement with his father, Mr. A. J. Russell Snow, by which the father was to purchase the \$8,000 mortgage absolutely, at a discount, and to pay off the \$6,000 advance made by Tisdale. Mr. Beaty Snow wrote to Mr. Tisdale requesting him to assign the Richards mortgage to his father upon receipt of the amount due to him and asking him at the same time to deliver to him a discharge of the \$6,000 mortgage upon the lands in question. The Richards mortgage was accordingly assigned, and the discharge of the \$6,000 mortgage on the lands in question was executed and delivered to Mr. A. J. Russell Snow. Mr. Beaty Snow also received from his father the balance coming to him in respect of the transaction.

This did not suffice to extricate Mr. Beaty Snow from his financial troubles. His father agreed to endorse a note for \$3,500, holding as security against liability upon this note the mortgage upon the lands in question and the unregistered discharge. The exact date of this transaction is somewhat uncertain. It is given as contemporaneous with the other transaction, about the 1st November, but the note, which is put in as exhibit No. 35, appears to be dated

the 3rd December, 1928. Mr. Snow apparently paid the note on the 7th January, 1929. App. Div.

At the time of the transaction, whichever is the accurate date, there were outstanding mechanics' liens for a large amount for work done and material supplied. None of these liens were registered until November, 1928. This however is not, in my view, material.

I assume in favour of Mr. A. J. Russell Snow that the transaction which I have outlined was sufficient to constitute an equitable mortgage and that the delivery of these documents to him comes within the words used in Halsbury, vol. 21, p. 79, para. 140, "is sufficient part performance of the implied agreement to give a security," i.e. a legal mortgage upon the land, but I do not think that this would give to Mr. Snow the right he now asserts. His right is at most an unregistered equitable right and cannot confer upon him any greater right than if he had an unregistered legal mortgage. He could acquire under this equitable right no greater right than Mr. Beaty Snow himself possessed. The mortgage was in fact discharged by the transaction which I have outlined. It no longer had any real existence. Whatever rights Mr. A. J. Russell Snow acquired when he signed the note, by virtue of the agreement in question, it was a new equitable right created on that day by Mr. Beaty Snow, and he could confer no greater right than he himself possessed. The liens, in this view, are entitled to priority.

I do not think the Registry Act has any application to the case in hand. If it has, it affords no comfort to Mr. Snow. The liens have now been registered, and I think they will prevail as against the unregistered equitable charge. Mr. Davis very properly called attention to the peculiar wording of sec. 72 of the Registry Act, which invalidates an equitable lien "as against a registered instrument executed by the same person," and contended that a mechanic's lien, although a registered instrument, is not "executed by the same person." It may be observed that this is a two-edged weapon, for the lien claimed by Mr. A. J. Russell Snow is not executed by Mr. Beaty Snow or any one else.

I think, further, that this argument fails for another reason. By the Mechanics' Lien Act, R.S.O. 1927, ch. 173, sec. 20, when the lien is registered the person entitled to the lien "shall be deemed a purchaser *pro tanto* and within the provisions of the

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App. Div. Registry Act," so that it is the duty of the Court to adjudge and  
 1931. regard the lienholders as though they were purchasers from Mr.  
 PANNILL Beaty Snow, which involves the presumption irrebuttable that Mr.  
 DOOR Co. Beaty Snow did execute a conveyance to the lienholders.  
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STEPHEN- For these reasons I think the appeal must be allowed with  
 SON. costs here and below, and the money directed to be paid to Mr.  
 Middleton, Snow should be paid to the lienholders.  
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*Appeal allowed.*

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[APPELLATE DIVISION.]

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CORSINI v. CITY OF HAMILTON.

June 15.

*Negligence—Explosion of Gas from Subterranean Chamber under Pavement of Street—Injury to Child—Action against Municipality and Gas Company—Nonrepair of Highway not in Question—Municipal Act, secs. 469 and 469a. (19 Geo. V. ch. 58, sec. 15) not Applicable—Explosion not Explained — Res Ipsa Loquitur — Liability of Municipality.*

The infant plaintiff, five years old, was playing upon a city street when an explosion took place in a subterranean chamber erected by the city corporation under the street pavement as part of its waterworks system. The explosion blew a heavy iron lid into the air, and the boy was injured seriously by burns from flames which came from the opened man-hole and by bruises received as he fell upon the pavement after being thrown into the air by the force of the explosion. The trial Judge dismissed an action brought by the boy and his father to recover damages for his injuries:—

*Held*, upon appeal, that what was complained of was not nonrepair of the highway, but negligence in the construction and operation of the waterworks system; and therefore sec. 469 of the Municipal Act, as amended by sec. 469a., enacted by 19 Geo. V. ch. 58, sec. 15, had no application—the highway as a highway was in perfect repair, but below its surface was this chamber, constructed for the purpose of housing valves in pipes forming part of the system.

The explosion was not explained—it may be taken to have been caused by the accumulation of explosive gas or vapour in the chamber. How this got there was not even hinted at in the evidence. The plaintiffs sued a gas company, as well as the city corporation, upon the theory that the gas might have come from some of its pipes, but the action was rightly dismissed as to that company because there was no evidence to support the theory.

And it was *held*, that the maxim *res ipsa loquitur* should be applied and the city corporation found guilty of negligence.

*Shawinigan Carbide Co. v. Doucet* (1909), 42 Can. S.C.R. 281, and *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, followed.

*Per HODGINS, J.A. (dissenting):*—Upon the whole evidence, the cause of the explosion is a mystery, and it cannot be attributed to anything under the defendant municipality's management or control, as the chamber contained only water-pipes and valves which were

not dangerous or likely to cause an explosion. No facts were set up or proved from which any reasonable or even plausible inference could be made; and there should be a new trial.

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AN appeal by the plaintiffs from the judgment of THOMSON, Co. C.J., dismissing an action brought in the County Court of the County of Wentworth against the Corporation of the City of Hamilton and the United Gas and Fuel Company of Hamilton Ltd.

The facts appear in the following reasons for the judgment of the County Court Judge:—

This case was tried on the 17th December, 1930, at my County Court sittings, and judgment was reserved in hopes that a settlement might be made.

This action is brought to recover damages for injuries sustained by the infant plaintiff, owing, as alleged, to the negligence of the defendants, and the plaintiff Orante Corsini claims incidental damages for hospital and doctor's bills incurred by him as a consequence of the accident.

On the 18th May, 1930, the infant plaintiff, who is a small boy, five years of age, was playing alone on a city street and in the immediate vicinity of a heavy metal lid, flush with the street-surface and at the intersection of two city streets, which lid covered a concrete chamber below the level of the street, and which chamber, it was admitted, is the property of the city corporation and used by the corporation in connection with its water service in the city of Hamilton. The entrance to the chamber is by a man-hole which is covered by the lid. This chamber is circular and is about four feet eight inches in height by a diameter of about five feet at its widest point. In it are contained levers or apparatus necessary for turning on or off the water supply. In the centre of the lid was a small centre lid, which I understand from the evidence is intended to facilitate the lifting of the large lid or cover. This smaller lid is referred to in the evidence as a "plug." While the infant plaintiff was so playing, an explosion occurred, as a result of which the large lid was hoisted into the air, and the infant plaintiff was carried with it a distance of eight or nine feet, and his clothing was set on fire by flames which apparently accompanied the explosion, and he was quite severely burned.

There is no evidence as to the nature or cause of the explosion, but it was inferred by the expert witness called for the defence that it might be caused by some flame coming in contact with com-

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bustible gas inside the man-hole. There is evidence that about a week prior to the accident some boys had dropped lighted matches through the "plug," thereby causing mild explosions, whereby the "plug" was blown into the air. There is no evidence to shew whether or not the "plug" was replaced or to shew that the city corporation had notice of these explosions. There is no evidence to shew that the infant plaintiff had anything to do with the explosion by which he was injured, and in any case his age would preclude any suggestion of contributory negligence.

The plaintiff, after proving the accident and the previous small explosions mentioned, rested his case, and a nonsuit was asked for by counsel for both defendants.

The counsel for the city corporation claimed that no negligence had been proven against the city, and that the necessary statutory notice under sec. 469, subsec (4), had not been given to the city corporation. Counsel for the gas company relied on the fact that no evidence had been given identifying his company with the explosion. The plaintiffs' counsel contended that the doctrine of *res ipsa loquitur* should be applied and the defendant called upon to explain the accident. Judgment was reserved on these points, and the defendants were directed to proceed with their defence. At the same time I stated that, if I could, I would excuse the plaintiffs' failure to give the notice if they could shew reasonable excuse for its want, it being admitted that no notice was given to the city corporation.

The defendant the city corporation proved that it had the chamber in question inspected by an expert a day or two before the trial, and it was then found to be apparently in good order and of proper and substantial construction. It did not prove that it had ever before been inspected. The city corporation also proved that no gas company had permission to use the chamber in question and that any gas company distributing gas in Hamilton would have to use its own mains. It was also proved that the defendant the United Gas and Fuel Company has no chamber or pipes in the vicinity of the intersection where the chamber in question is situate.

As there is no evidence whatever that the defendant the United Gas and Fuel Company of Hamilton Ltd. had anything to do with the accident, I dismiss the action against it with costs, if de-

manded, but I hope that, under the circumstances, these costs will not be demanded.

I also dismiss the action against the defendant the Corporation of the City of Hamilton without costs, on the ground that notice was not given pursuant to subsec. (4) of sec. 469 of the Municipal Act, as amended by sec. 469a. enacted by 19 Geo. V. ch. 58, sec. 15.

I regret having to do this, but there is no evidence shewing a reasonable excuse for the want of the notice. The plaintiff Orante Corsini did swear that a representative of the city came down to inspect the chamber very soon after the explosion, but from his counsel's statement it is evident that this plaintiff did not know that it was necessary to give the statutory notice, and did not consult his solicitor until the time to do that had expired. In view of the decision in *Fuller v. City of Niagara Falls* (1920), 48 O.L.R. 332, and the cases there mentioned, and *Bissell v. Township of Rochester* (1930), 65 O.L.R. 310, I come to the conclusion that I cannot dispense with the notice, but certainly the defendant the city corporation was not prejudiced in its defence by the want of the notice. There do not seem to be any authorities dealing with the question of want of notice by an infant plaintiff.

If I am wrong in so holding, then I would, with some hesitation, find the defendant the city corporation liable.

While it is true that this defendant was neither a distributor nor a manufacturer of gas and had no actual notice of any accumulation of gas (if it was gas) in this chamber, I think it should have had an inspection made from time to time to ascertain if there was any accumulation of explosive substance sufficient to cause damage. A similar accident had occurred in a similar chamber (see *Collier v. City of Hamilton* (1914), 32 O.L.R. 214). This defendant did not prove that more than the chamber in question was owned or operated by it, and it seems to me that it would not be unreasonable to hold that inspections should have been made, and to assume, though the plaintiffs did not prove that they would, that such inspections, if made, would have prevented the accident.

The plaintiffs' counsel, as before stated, argued that the doctrine of *res ipsa loquitur* should be applied. The counsel for the city corporation on this point relied on *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652, 663. The decision in that case was questioned by judgments of the Court of Appeal in *McGowan*

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v. *Stott* (1930), 143 L.T.R. 217, and the rule as to *res ipsa loquitur* was said to be more truly stated in the well-known case of *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, where the rule was stated to be as follows:—

“There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.”

I think this case comes under that rule, and I, sitting as a jury, would hold that there was sufficient negligence shewn by the city corporation to call on it for an explanation. Its explanation, namely, that the chamber appeared to be well constructed and in a normal condition after the accident, is in my opinion not sufficient to exonerate this defendant from liability in view of the want of inspection indicated. I think that this defendant is liable for creating a nuisance in a highway, and I quote from the judgment of Rose, J. (the trial Judge), in *Prentice v. City of Sault Ste. Marie*, [1928] S.C.R. 309, at p. 315:—

“A municipality, like every one else, may be liable, apart from statute, for creating a nuisance in a highway, and if a person sustains damage—that is, special damage, different from the damage suffered by others—by reason of the nuisance so created, the person, whether a municipality or any one else, who created it is liable for those damages; that rule being subject, however, in the case of a person or corporation exercising a statutory authority, to the qualification that if the nuisance is created in the exercise of that statutory authority, liability does not result unless the nuisance was created negligently. The case, therefore . . . raises, as I think, only the question, did these defendants, exercising their statutory powers as a sewer authority, create a nuisance negligently, and if so did the nuisance so created cause the damage of which the plaintiffs complain?”

See also the cases cited in 8 C.E.D. (Ont.), pp. 192, 193.

The defendant the Corporation of the City of Hamilton had a statutory right to distribute water and use this chamber in connection with that duty, but I hold that it had no right to allow accumulation therein of some explosive force to the injury of the

public and these plaintiffs in particular. This accumulation undoubtedly created a nuisance, for which the corporation is liable in that it did not abate it before these serious consequences happened.

I do not think this case is one of ordinary nonrepair of a highway within sec. 469 of the Municipal Act, but the plaintiffs are exercising a common law right to sue for damages in a case of actual misfeasance on the part of the municipality, where this negligence created a nuisance. This was so decided by the Supreme Court in the *Prentice* case, where it was held that under these circumstances the statutory notice was not necessary. The Legislature, however, as usual, promptly came to the assistance of the municipalities and passed an amendment to the Municipal Act, already referred to, whereby the provisions of subsecs. (2) to (8) of sec. 469 should apply to an action brought against the corporation for damages occasioned by the presence of any nuisance on a highway.

I have not overlooked subsec. (7) of sec. 469, but that is not applicable.

I would assess the damages to the plaintiff Orante Corsini at \$248.50 and to the infant plaintiff Silvio Corsini at \$700, the latter amount to be paid into court for him. This boy had a severe burning and suffered greatly but has now apparently recovered.

I might say that the case of *Collier v. City of Hamilton*, relied on by the defendant the city corporation, is a master and servant case, and the principle of *res ipsa loquitur* does not apply to such cases.

In the meantime, as before stated, the action stands dismissed.

June 1. The plaintiffs' appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*T. N. Phelan*, K.C., for the appellants, contended that this is not a case of an accident arising out of the neglect or disrepair of the highway, therefore sec. 469 of the Municipal Act, R.S.O. 1927, ch. 233, is not applicable: *Ormsby v. Township of Mulmur* (1916), 36 O.L.R. 566. Assuming that the section is applicable, an infant ought to be excused from giving the notice as required. The coincidence that the water chamber while exploded and which was the cause of the accident happened to be underneath the highway does not make the Highway Traffic Act, R.S.O. 1927, ch. 251, applicable: *Bissell v. Township of Rochester* (1930), 65 O.L.R. 310.

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*A. J. Polson*, for the defendant city corporation, respondent. The infant plaintiff is in no different position than an adult as far as the necessity of giving notice under the Municipal Act is concerned: *Dillon on Municipal Corporations*, 5th ed., vol. 4, pp. 2817, 2818. There is no evidence of negligence on the part of the defendant corporation. The evidence shews that it had no notice that explosions had ever occurred before in this water chamber. It could not be expected that gas could ever enter this chamber, let alone accumulate there.

*Phelan*, K.C., in reply, referred to *Crepin v. Ottawa Electric Co.* (1930), 66 O.L.R. 409, and *Capital Building Cleaners v. Slater-Sherwood* (1930), 65 O.L.R. 364, in regard to the doctrine of *res ipsa loquitur* as applied to municipalities. The onus was on the defendant, which was in possession of the instrument which caused the damage, to shew how the accident occurred. No effort whatever was made to do so.

June 15. MIDDLETON, J.A.:—An appeal by the plaintiff from the judgment of his Honour Judge Thomson dismissing an action brought in the County Court of the County of Wentworth, by Silvio Corsini, an infant, and his father, Orante Corsini.

On the 18th May, 1930, the infant plaintiff, an Italian lad about five years old, was playing upon one of the streets of the city of Hamilton when an explosion took place in a subterranean chamber erected by the city corporation upon the street as part of its waterworks system. This explosion blew a heavy iron lid into the air, and the boy was injured, not by a blow from the lid, but seriously by burns from flames which came from the opened man-hole and by bruises received as he fell upon the pavement after being thrown in the air by the force of the explosion.

The learned Judge has dismissed the action upon the theory that that which is complained of is nonrepair of a highway, and that notice was not given as required by sec. 469 of the Municipal Act, as amended by sec. 469a., enacted by 19 Geo. V. ch. 58, sec. 15.

In my opinion, the learned Judge erred in dismissing the action upon this ground. What is complained of is not nonrepair of the highway, but negligence in the construction and operation of the waterworks system. The highway as a highway was in perfect repair, but below its surface was this chamber, constructed for the purpose of housing valves in pipes forming part of the system.

The case is one to which the maxim *res ipsa loquitur* may properly be applied. The words of Mr. Justice Duff in *Shawinigan Carbide Co. v. Doucet* (1909), 42 Can. S.C.R. 281, at p. 330, are exceedingly appropriate:—

“There is sufficient ground in the circumstances of this case for affirming that the explosion . . . . was due to some want of care on the part of the appellants, although the specific point in which they failed in their duty is not made to appear. There are many cases in which the fact alone of an accident occurring is held to be a sufficient foundation for such an inference. Speaking broadly . . . . this inference is held to be permissible when the injury has been caused by something wholly within the control of the defendant or of persons for whose actions he was responsible, and the occurrence to which the injury was due was not of such a character as would ordinarily take place in the absence of negligence.”

Or equally applicable are the words of the leading case *Scott v. London and St. Katherine Docks Co.*, 3 H. & C. 596, 601: “Where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.”

This principle was applied in a very similar case by Palles, L.C.B., in the Irish case *Farrell v. Limerick Corporation* (1911), 45 Irish L.T.R. 169. There the plaintiff, walking upon one of the streets of Limerick, was injured when an explosion occurred near the base of a lamp-post which “caused the metal plate to open and a flash to emanate” which injured the plaintiff. The Chief Baron held “as a matter of law that the fact of the explosion was *primâ facie* evidence of negligence which was not rebutted by the evidence for the defendants. It was a case in which the doctrine of *res ipsa loquitur* clearly applied.”

I also refer to the very elaborate discussion of the authorities by the Irish Lord Chancellor, Sir Ignatius O’Brien, in the case of *Coughlan v. Monks*, [1918] 2 I.R. 306.

The explosion which here occurred is in no way explained. It may be taken for granted that it was caused by the accumulation of explosive gas or vapour in the man-hole. How this got there is not even hinted at in the evidence. The plaintiffs sued the

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United Gas Company upon the theory that the gas might have come from some of its pipes, but the action was rightly dismissed as to that company because there was no evidence in support of this theory. The gas might have come from any source. It might even have been natural gas coming from the soil. It might have been gas resulting from the electrolytic action of an electric current upon the water-pipes passing through the chamber. From whatever source it came, it evidently accumulated in this chamber, and the chamber, having no system of ventilation, accumulated the gas until something caused it to explode. The defendants sought to meet the onus cast upon them by calling an expert who testified that the concrete chamber was properly constructed. This evidence, it appears to me, was directed to an irrelevant point, or at most one to meet a possible contention that the concrete ought to have been sufficient to resist the percolation of gas. It did not in any way explain the absence of any system of ventilation, nor did it go to shew that a periodical inspection should not have been made for the purpose of ascertaining if gas was in fact accumulating, and the Judge was well warranted, in my opinion, in finding that the evidence given was not sufficient to exonerate the defendants from liability for failure to inspect.

I would also refer to an American case, *Hunt v. Mayor etc. of New York* (1888), 109 N.Y. 134, where it was held that a municipality was liable for the explosion of gas in a subterranean chamber because it appeared that, had a perforated cover been used instead of a solid metallic disk, this would have insured adequate ventilation to prevent such an accumulation of gas as would cause a dangerous explosion.

In my opinion the appeal should be allowed and there should be judgment for the plaintiffs for the damages assessed to them respectively by the learned trial Judge, and for the costs of the action and appeal. The money payable to the infant will, of course, go into court to his credit.

MULOCK, C.J.O., and MAGEE and GRANT, JJ.A., agreed with MIDDLETON, J.A.

HODGINS, J.A.:—The learned trial Judge dismissed this action for lack of the notice required under sec. 469 of the Municipal Act, R.S.O. 1927, ch. 233, as amended by sec. 469a., enacted by the Ontario statute of 1929, ch. 58, sec. 15.

This section deals with the duty of a municipality to maintain and repair the highways within its boundaries. App. Div.

The accident which happened was due to some cause originating in a chamber constructed under the pavement for the examination and control of water-valves, being part of the equipment for supplying water by the municipality to its users in Hamilton.

Whatever this cause was, it operated to blow up an iron covering over the chamber which formed part of the surface of the roadway. This cover hit the infant plaintiff, who in this case sues the defendant for damages caused thereby.

This action is not based on nonrepair of the highway. No fault is found with the highway as such, or its state of repair, and the iron cover was legitimately part of its surface.

The injury arose from something quite foreign to the pavement, namely, an explosion under it, the elements of which could have nothing to do with the repair or disrepair of the highway.

For this reason I think sec. 469, as amended, does not apply, and that there must be a new trial. As the injury was caused by the blow from the iron cover which formed part of the pavement, the onus would naturally be upon the defendant to account for its striking the plaintiff. But upon the whole evidence the cause is a mystery, and it cannot be naturally or plausibly attributed to anything under the defendant's management or control, as the chamber was one in which there are only water-pipes and valves, and these were in no sense dangerous or likely to cause an explosion.

In Halsbury's Laws of England, vol. 21, para. 752, the distinction between cases in which the maxim *res ipsa loquitur* applies and those where the cause of the accident is unknown is stated in these words:—

"In the one case further evidence is not required from the plaintiff, because the inference is already clear; in the other case it is not required because it would be impossible to give it. The effect of the distinction is that, in the one case, the defendant is liable if he does not produce sufficient evidence to counteract the inference; in the other case, the court is left to decide, upon such facts as are available, whether negligence on the part of the defendant is the more reasonable inference or not."

This statement is founded on *McArthur v. Dominion Cartridge Co.*, [1925] A.C. 72, and on two Irish cases, *Farrell v. Limerick Corporation*, 45 Irish L.T.R. 169, and *Flannery v. Waterforth etc.*

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App. Div. *Railway Co.* (1877), 11 I.R.C.L. 30. In the latter case evidence  
 1931. was given by the defendants that the underground explosion which  
 — injured the plaintiff when passing an electric lamp, beside which  
 CORSINI was a sunken chamber covered with an iron plate, was due to an  
 v. "act of God" or atmospheric conditions. Palles, L.C.B., held that  
 CITY OF the fact of the explosion was *primâ facie* evidence of negligence,  
 HAMILTON. the fact of the explosion was *primâ facie* evidence of negligence,  
 — Hodgins, which was not rebutted.  
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But here there are no facts set up or proved from which any reasonable or even plausible inference can be made, and only surmise is possible. In my judgment, therefore, a new trial is necessary, and we cannot enter judgment for the plaintiffs in the present state of the record.

It is not necessary to decide whether or not an infant must fail in an action based on nonrepair under sec. 469 if no notice is given.

The costs, however, of the former trial and of this appeal should be to the plaintiff in any event.

*Appeal allowed and judgment for the plaintiffs directed* (HODGINS, J.A., dissenting).

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[APPELLATE DIVISION.]

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O'CONNOR v. WALDRON.

June 15.

*Defamation—Absolute Privilege—Statements Made by Commissioner in Course of Inquiry—Combines Investigation Act, R.S.C. 1927, ch. 26—Frivolous or Vexatious Action—Summary Dismissal—Rule 124—Public Policy—Status and Powers of Commissioner.*

The order of ORDE, J.A. (1930), 65 O.L.R. 407, summarily dismissing an action for slander upon the ground that the statement of claim disclosed no reasonable cause of action, or that the action was frivolous or vexatious in that it was brought in respect of certain statements alleged to have been made upon an occasion that was absolutely privileged, was affirmed (HODGINS, J.A., dissenting).

*Held*, by the majority of the Court, that the appointment of the defendant as a commissioner, under the Combines Investigation Act, R.S.C. 1927, ch. 26, to inquire into and investigate the existence of an alleged combine, and, if he should find that a combine existed, to report those who are believed to be parties or privies to the combine, conferred upon him a status entitling him to rely upon the judicial privilege or the privilege of courts and other tribunals exercising true judicial functions; and the statements complained of were made upon a privileged occasion.

*Per* HODGINS, J.A.:—Unless absolute privilege exists, such an action as this will lie. The plaintiff's assertion that the appointment of

the defendant as commissioner was not legally made, in that secs. 11 to 13 of the Act were not complied with, raised an issue which the plaintiff was entitled to have tried, as the commission itself afforded only a presumption of regularity, which was rebuttable. An authoritative pronouncement should be made, and that can only be done by sending the case for trial. Apart from that the plaintiff is entitled to set up and prove, if he can, the words which the defendant does not admit using, as they appear to be irrelevant to the inquiry. And the defendant has also the right to dispute the regularity of the issue of the commission itself. Wherefore the action should not have been summarily dismissed and should be tried in the usual way.

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AN appeal by the plaintiff from the order of ORDE, J.A. (1930), 65 O.L.R. 407.

April 20 and 21. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

The appellant, in person, argued that the remarks complained of were not privileged because the defendant was neither a Judge, nor performing judicial functions, nor acting as a court. The decision in *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310, having relegated the Combines Investigation Act, R.S.C. 1927, ch. 26, to the realm of criminal law, the defendant, if acting as any kind of a court, was acting as a criminal court. But that could not be because such cannot be constituted by the Dominion Government. Outstanding matters of fact have been pleaded which require determination by trial. It is pleaded that secs. 11, 12, and 13 of the Combines Investigation Act have not been complied with. The order in council appointing the commission is invalid because the Registrar reported that there was a combine. Under secs. 13 and 31 this report took away the jurisdiction of the Minister to direct a further investigation by a commission. There was no absolute privilege. A "trial recognised in law," as spoken of in the cases, must be in a court and does not include inquiries by a commission. The two conditions which give rise to an occasion of absolute privilege are, first, that it be a court, and, second, the performance of judicial functions: *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431, at pp. 447, 448, 451; Halsbury's Laws of England, vol. 18, para. 1253, pp. 679-682; *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255; *Barratt v. Kearns*, [1905] 1 K.B. 504; *Watson v. McEwan*, [1905] A.C. 480; *Nixon v. O'Callaghan* (1926), 60 O.L.R. 76; *Slack v. Barr* (1918), 82 J.P. 91; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K.B. 405; *Attwood v.*

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 1931. *way & Co.*, [1927] 2 K.B. 378; *Re Grosvenor and West-end Rail-*  
 O'CONNOR *way Terminus Hotel Co.* (1897), 76 L.T.R. 337; Halsbury's Laws  
 v. of England, vol. 11, pp. 540, 612, 604-7, 633.  
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*H. H. Davis*, K.C., for the defendant, respondent. The powers given to the commission in the patent are not only under the Combines Investigation Act but also under the Inquiries Act, R.S.C. 1927, ch. 99. Section 22 of the Combines Investigation Act gives all the powers of any superior Court of Canada. It is not necessary to go farther, on the ground of public policy, than to find a public official of the Federal Government acting under a patent. Under the general rule of law there has grown up the immunity of all parties connected with the commission. The rule has been extended to a commission acting in the interests of the public, vested with authority from the Federal Government. It need not be a court in the narrow or technical sense as long as there is a tribunal acting like unto or in the same way as a regular court. Reference to *Barratt v. Kearns*, *supra*; *More v. Weaver*, [1928] 2 K.B. 520, at p. 522; *Nixon v. O'Callaghan*, *supra*; *Halls v. Mitchell*, [1928] S.C.R. 125, at p. 145; *Georgeson v. Moodie* (1917), 38 D.L.R. 105; Halsbury's Laws of England, vol. 18, p. 671; Harvard Law Review, vol. 41, p. 403.

June 15. HODGINS, J.A.:—The order in council under which the defendant was appointed a commissioner was made pursuant to the Combines Investigation Act, R.S.C. 1927, ch. 26. In it, the Minister recommended the appointment of the defendant as commissioner under the said Act, to investigate the position of the Amalgamated Builders Council, the Canadian Plumbing and Heating Guild, and the business of the Dominion Chamber of Credits and of certain other persons. Pursuant thereto a commission under the Great Seal was issued to the defendant to conduct the inquiry mentioned in the order in council. That commission conferred upon the commissioner, among other things, "the power of summoning before him any witnesses and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as our said commissioner shall deem requisite to the full investigation of the matters into which he is hereby appointed to examine." And

required and directed the commissioner "to report to our Minister of Labour the results of his investigation together with the evidence taken before him and any opinion he may see fit to express thereon."

Lord Atkin, speaking for the Judicial Committee in the case of *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310, in which the constitutionality of the Combines Investigation Act was challenged, judgment being delivered on the 31st January, 1931, thus summarises the provisions of the Act which describe the duties of a commissioner thereunder (p. 322) :—

"By the Act the Governor in Council may name a Minister of the Crown to be charged with the administration of the Act, and must appoint a registrar of the Combines Investigation Act. The registrar is charged with the duty to inquire whether a combine exists, whenever an application is made for that purpose of six persons supported by evidence, or whenever he has reason to believe that a combine exists, or whenever he is directed by the Minister so to inquire. Provision is made for holding further inquiry by Commissioners appointed from time to time; and the registrar and a commissioner are armed with large powers of examining books and papers, demanding returns, and summoning witnesses. The proceedings are to take place in private unless the Minister directs that they should be public. The registrar is to report the result of any inquiry to the Minister, and every commissioner is to report to the registrar who is to transmit the report to the Minister. Any report of a commissioner is to be made public unless the commissioner reports that public interest requires publication to be withheld, in which case the Minister has a discretion as to publicity."

In regard to the constitutionality of the Act, the Privy Council decided that the section of the Criminal Code which was attacked, namely, 498, "and the greater part of the provisions of the Combines Investigation Act," fell within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters," sec. 91, head 27, of the British North America Act.

In dealing with the provisions of the Act, and having contrasted it with the earlier Acts, Lord Atkin makes this observation (p. 325) :—

"There is a general definition, and a general condemnation;

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and if penal consequences follow, they can only follow from the determination by existing courts of an issue of fact defined in express words by the statute. The greater part of the statute is occupied in setting up and directing machinery for making preliminary inquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either commissioner or registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished, must be tried on indictment, and the offence proved in due course of law. Penal consequences, no doubt, follow the breach of orders made for the discovery of evidence; but if the main object be *intra vires*, the enforcement of orders genuinely authorised and genuinely made to secure that object are not open to attack."

He then makes a remark, dealing with the question whether property and civil rights in the Province were affected, which I think is relevant to the question to be decided in this appeal (p. 327):—

"Most of the specific subjects in sec. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to sec. 92, head 14, 'the administration of justice in the Province,' even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice."

The duty cast upon the commissioner, according to the judgment of the Judicial Committee, is to make preliminary inquiries as to whether an offence under the Act has been committed and to report to the Minister. No penal consequences follow directly from the report of a commissioner, and it is not even made evidence. To the Minister is confided under sec. 31 the duty of deciding whether an offence has been committed and whether a prosecution should follow. Then and not till then does any proceeding in the courts take place.

The above preliminaries are entered upon and proceeded with, under sections of the statute, to ascertain whether a criminal offence has, or has not, been committed. Preliminary inquiries by justices of the peace, magistrates, and the grand jury are familiar instances of such a procedure; and, as the Dominion Parliament

has jurisdiction over criminal procedure, it has authority to define what steps shall be taken in reference to any particular crime, as is done by this statute. But none of these familiar instances referred to provides for any report to a Minister of the Crown before action is decided upon. The procedure under the Act in question is not uncommon where the matters to be investigated are complicated, as under the Loan and Trust Corporations Act, R.S.O. 1927, ch. 223, sec. 144, and the Security Frauds Prevention Act, 20 Geo. V. ch. 39, Part II., but no one suggests that those who make such preliminary inquiries are, in any sense, a court, although to the provincial authorities is entrusted the constitution of the courts. In the *Proprietary Articles* case the procedure is justified by the Judicial Committee as part of the administration of the Act effected by inquiries to ascertain whether the statutory crime of assisting in the formation or operation of a combine has been committed. "The criminal quality of an act cannot be discerned by intuition" (p. 324).

It is true that the commissioner in making his inquiry is adorned with some of what have been referred to as the "trap-pings" of a real court.

In a recent judgment given in the Privy Council, *Shell Co. of Australia v. Federal Commissioner of Taxation*, [1931] A.C. 275, when dealing with the question as to whether a board of appeal was in fact a court, or merely an administrative board, the distinction is pointed out in these words (p. 294):—

"Instead of the Board being given the powers and functions of the Court, it is given 'the powers and functions' of the Commissioner in making assessments, determinations and decisions under this Act."

And the Judicial Committee (pp. 295, 296) define "judicial power" by adopting the definition of Griffith, C.J., in *Huddart Parker & Co. Proprietary Ltd. v. Moorehead* (1908), 8 Commonwealth L.R. 330, 357:—

"I am of opinion that the words 'judicial power' as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding

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and authoritative decision (whether subject to appeal or not) is called upon to take action."

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Lord Sankey, L.C., adds:—

"This definition of 'judicial power' suggests to their Lordships a further material difference in the status of the two Boards not alluded to by Isaacs, J."

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The material difference is that:—

"It is only the decision of the Court which, in respect of an assessment, is now made final and conclusive on all parties: a convincing distinction, as it seems to their Lordships, between a 'decision' of the Board and a 'decision' of the Court."

They sum up their view in a few words (p. 298):—

"An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by an *ad hoc* tribunal an exercise by a Court of judicial power."

This statement stands beside the assertion that a tribunal is not necessarily a court in the strict sense because it gives a final decision or one which affects the rights of subjects.

Lord Atkin in the *Proprietary Articles* case distinctly rejects the idea that the inquiry made by the commissioner interferes with the administration of justice in the Province. Now to interfere with the administration of justice in the Province is to interfere with the Courts in their administration of justice. It cannot therefore have been intended to constitute a court, as that would be to interfere with the administration of justice in the Province and the constitution of its courts. If it is a tribunal recognised by law it would seem to be one which is essentially not a court but a tribunal conducting a statutory inquiry.

To my mind, therefore, the Act does not erect or intend to erect a court, and the question to be settled is whether the commissioner is an administrative officer merely or a tribunal recognised by law in the sense in which that expression is used in reference to those compelled to give evidence before it.

The best definition that I have found is contained in the last edition of Odgers on Libel and Slander, 6th ed. (1929), p. 195, where it is said that:—

"An absolute privilege also attaches to all proceedings of, and to all evidence given before, any tribunal which by law, though

not expressly a Court, exercises judicial functions—that is to say has power to determine the legal rights and to effect (*sic*) the status of the parties who appear before it. All preliminary steps which are in accordance with the recognised and reasonable procedure of such a tribunal are also absolutely privileged. It is not necessary that the tribunal should have all the powers of an ordinary Court.”

In *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. at p. 442, Lord Esher said that absolute immunity “applies wherever there is an authorised inquiry which, though not before a Court of Justice, is before a tribunal which has similar attributes.” But he adds that “the doctrine has never been extended further than to Courts of Justice and tribunals acting in a manner similar to that in which such Courts act.”

This accords with the remarks of Fry, L.J., in the same case where he says (p. 447):—

“It seems to me that the sense in which the word ‘judicial’ is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterise proceedings in Courts of Justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a Court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially.”

This decision dealt with the language used by a member of the London County Council when considering the applications for Music Hall licences, and it was held that the duties which the council was thus performing were administrative and not judicial and that there was not absolute immunity but that privilege attached where “a body of persons are engaged in the performance of the duty imposed upon them, of deciding a matter of public administration, which interests not themselves, but the parties concerned and the public . . . provided the person who utters it is acting *bonâ fide*, in the sense that he is using the privileged occasion for the proper purpose and is not abusing it. It is sometimes said that he must be acting *bonâ fide* and not maliciously; but I do not think that that way of expressing the rule is quite exhaustive or correct. I think the question is whether he is using the occasion honestly or

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abusing it. If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion. The jury here appear to have thought that the defendant said what was false knowing it to be false. I cannot agree with that view of the case. If the case depended on a finding to that effect, I should be very loth to find it. But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held by a jury to have abused the occasion, and in that sense to have spoken maliciously. If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion."

Another aspect of the question is suggested by the case of *Burr v. Smith*, [1909] 2 K.B. 306, where privilege was held to be absolute in the sense that absolutely privilege attaches to the performance of the duty of an official receiver in a liquidation to prepare and submit a report to the Board of Trade. In that case Fletcher Moulton, L.J., said (pp. 312, 313):—

"The ground upon which I base my judgment is that the defendant was acting as an officer of the Board of Trade, who had to prepare this report in order to enable that Board to perform their statutory duty under sec. 29. In collecting the materials for and preparing this report he may be said to have acted as the hand of the Board of Trade; and in communicating this report to that Board I do not think he was communicating it to any other body than that of which he was for this purpose, so to speak, a component part. I hold that the coming of this report into the hands of the superior officials of the Board cannot be looked upon as a publication of it for the purpose of the law of libel."

Farwell, L.J., at p. 316, said:—

"I do not see any difference, in point of principle, between the position of the official receivers and the Inspector-General in Companies' Liquidation in making these reports and that of a chief clerk of a judge in the Chancery Division in reporting on a case to the judge. No one has ever dreamed of suggesting that in such a case the chief would be liable to an action for libel."

It will be noted that in most of the leading cases on this subject it is the protection of the witness that is dealt with. The rea-

son is that where a tribunal is properly constituted pursuant to statute or recognised by law which can compel persons to attend and give evidence the witness is protected because he is compelled to give evidence.

Chief Baron Kelly in *Dawkins v. Lord Rokeby*, on appeal to the House of Lords (L.R. 7 H.L. 744), giving the opinion of the Judges, said, at pp. 752, 753:—

“A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a Court of Justice. This does not proceed on the ground that the occasion rebuts the *primâ facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary Courts of Justice, are numerous and uniform. In the present case, it appears in the bill of exceptions that the words and writing complained of were published by the defendant, a military man, bound to appear and give testimony before a Court of Inquiry. All that he said and wrote had reference to that inquiry; and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary Court of Justice.”

But even in the case of a witness there is an exception mentioned by Cockburn, C.J., in *Seaman v. Netherclift* (1876), 2 C.P.D. 53, 56, 57, in these words:—

“But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different. . . . Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked: ‘Were you at York on a certain day?’ and he were to answer: ‘Yes, and A.B. picked my pocket there;’ it certainly might well be said in such a case that the statement was altogether *dehors* the character of witness, and not within the privilege.”

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The defendant in that case escaped only because what he said in the witness-box was in reference to or relevant to the inquiry.

In the statement of the Chief Baron in advising the House of Lords in the *Dawkins* case, *ante*, it will be observed that he says: "All that he said and wrote had reference to that inquiry;" and Lord Cairns, L.C., in the same case, at pp. 754, 755, deals with the importance of relevancy, in these words:—

"The defendant in the action was called upon that inquiry as a witness, as a person who was required to make statements relevant to the inquiry which was then being conducted, and it was in the course of that inquiry that those statements were made.

"It is not denied that the statements which he made, both those which were made *vivâ voce* and those which were made in writing, were relative to that inquiry."

It is the relevancy of the observations made by the defendant to the duty which he had to perform that is here objected to and forms the basis of this action, and it is urged that, even if this is such a tribunal as that a witness compelled to appear before it would be protected no matter what his answers in the box were, the defendant here was under no compulsion and had only to perform the duty imposed on him, which did not include that which he did and said.

It is, I think, quite clear that, unless absolute privilege exists, such an action as this will lie: *Adam v. Ward*, [1917] A.C. 309. The facts in that case were that, after statements had been made by the plaintiff in the House of Commons which ascribed to a certain officer wilful and deliberate misstatements of fact, and the Army Council had held an inquiry at the request of the accused officer and made a report, they afterwards published a letter, which letter reflected severely on the plaintiff. The ground of privilege indicated was that, while the statement of the plaintiff in the House of Commons was absolutely privileged, it was provocative, and that the observations in the letter reflecting on him were reasonable and relevant in vindication of the officer who was the subject of the inquiry. The House of Lords considered the whole subject of defamation arising out of the act of a public body.

In examining the pleadings it will be seen that the defamatory matter complained of is contained in a question by the defendant to a witness. The question was directed to one whose actions were

the subject of inquiry, and was unnecessary, intemperate, and opprobrious in its reference to the plaintiff, a member of the legal profession, whose actions were then also to be, or were being, investigated. If the defendant's duty was merely to inquire and report, and even if it included the duty to form and to express in his report his opinion (though this is nowhere provided for in the Act), then he was travelling out of the path of his duty in scarifying in public any one compelled to come before him. It is true the sense of the defamatory matter in question may be a little obscure or even incoherent in parts, but it is not denied that the words, with one exception, were spoken of the plaintiff or that they were defamatory.

The plaintiff asserts and pleads, in para. 3(b), that the appointment of the defendant as commissioner was not legally made, in that the provision of the Combines Investigations Act contained in secs. 11 to 13, inclusive, were not complied with. I think he has a right to have this issue tried, as the commission itself only affords a presumption of regularity and that presumption is rebuttable.

In *Barratt v. Kearns*, [1905] 1 K.B. 504, Collins, M.R., said, on p. 510:—

“We find a commission conforming on the face of it with the statutory provisions applicable to such a commission, and it is for the person who raises an objection to the constitution of the commission to support his objection by evidence, and that has not been done.”

And by Cozens-Hardy, L.J., thus (p. 511):—

“We are bound to treat the tribunal constituted by the Commission as a statutory body, and the presumption, in the absence of evidence to the contrary, is that everything was done in the constitution of the tribunal which ought to have been done.”

I have not overlooked the case of *Georgeson v. Moodie* (1917), 38 D.L.R. 105, 12 Alta. L.R. 358. In that case the authorities I have considered are all discussed, but the decision throws no new light on the position of the defendant here.

The case at bar raises some interesting and important questions, namely, the exact status of a commissioner appointed under the Combines Investigations Act and similar statutes. Is he constituted a tribunal recognised by the law and as such absolutely privileged in his conduct and language during the inquiry, or only

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when, in the words of Lord Justice Fry, he is acting with the fairness and impartiality which characterise proceedings in courts of justice and are proper to the functions of a Judge? Is his privilege limited to what he states in his report or does it extend to all he says during the inquiry? Does the qualification of a witness's privilege apply to him, and has relevancy, spoken of by Kelly, C.B., and Cairns, L.C., any bearing upon his conduct and language?

There is a great preponderance of authority in favour of absolute privilege for those who act or profess to act judicially in performing some statutory duty, but none to my mind which settle definitely that there is no limit to what can be said to and of those who are during an inquiry being examined in public and in face of the press and who are not then on their trial. The law of qualified privilege as expounded in *Adam v. Ward*, *ante*, seems to me an adequate protection for any one acting under a commission such as this. As commissions such as the one in question are frequently issued in Canada to Judges and others to inquire into social, economic, and professional matters, and in some cases into questions which in working out may touch some political issue or party, it is to my mind advantageous that an authoritative pronouncement should be arrived at, and that that can only be done by sending the case for trial. The case of *Electrical Development Co. of Ontario v. Attorney-General for Ontario*, [1919] A.C. 687, gives an indication of the view of the Privy Council in that direction on a somewhat similar point arising in a much less contentious case.

Apart from that view, I think that the plaintiff is entitled to set up and prove, if he can, the words which the defendant does not admit using, as they seem rather irrelevant to the inquiry. The plaintiff has also the right to dispute the regularity of the issue of the commission itself.

On the whole, therefore, I am inclined to the view that the appeal should be allowed and the action sent to trial. Costs of appeal in the cause.

MIDDLETON, J.A.:—Appeal by the plaintiff from the judgment of Mr. Justice Orde, pronounced on the 5th May, 1930, upon a summary application made by the defendant for an order dismissing the action, upon the ground that the statement of claim discloses no reasonable cause of action, or that the action is frivolous

or vexatious in that it is brought in respect of certain statements alleged to have been made upon an occasion that was absolutely privileged. The application was granted, and the action was dismissed with costs.

The reasons given by the learned Judge are reported at length in 65 O.L.R. 407.

The defendant was, on the 19th July, 1929, by commission issued under the Great Seal of Canada, appointed a commissioner for the purpose of conducting an inquiry under the terms of the Combines Investigation Act, R.S.C. 1927, ch. 26, with the power authorised by the Revised Statutes of Canada respecting inquiries concerning public matters, to summon before him witnesses and require them to give their evidence under oath, and to produce upon such inquiry all books, papers, and documents relative to the inquiry. The commissioner is required and directed to report to the Minister of Labour the result of his investigation, together with the evidence taken before him, and any opinions he may see fit to express thereon.

The particular subject of the inquiry is defined in a report from the Minister of Labour to the Privy Council, which is attached to and forms part of the commission. This states that representations have been made to the Minister of Labour to the effect that the Amalgamated Builders Council, an organisation including in its membership plumbing and other contractors and dealers in the building trades in certain named places within the Province of Ontario, is a combine within the meaning of the Combines Investigation Act. The commissioner is to investigate the existence of the alleged combine, and, if he finds that a combine exists, to report those who are believed to be parties or privies to the combine.

During the course of the inquiry it was suggested that the plaintiff, who is a practising barrister and solicitor, had suggested or advised the things that were shewn to have been done, and which, in the opinion of the commissioner, constituted a combine. The commissioner expressed his disapproval of the plaintiff's conduct in strong and emphatic language. Hence this action.

Upon the argument of the appeal, the plaintiff confined himself to the presentation of three contentions only, although the notice of motion took a wider range.

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During the course of the argument it became plain that there was only one contention really relied upon, to wit, that the appointment of the defendant under the statute in question did not confer upon him a status entitling him to rely upon that immunity which is commonly described as the judicial privilege, or the privilege of courts and other tribunals exercising true judicial functions.

Many of the cases are reviewed and discussed in the judgment appealed from, and I do not think any good purpose would be served by reiterating what is there said.

I accept, as a starting point for the little that I find it necessary to state, the often-quoted words of Lord Esher, M.R., in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431, 432: "It is true that, in respect of statements made in the course of proceedings before a Court of justice, whether by Judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorised inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes."

In the case of *Dawkins v. Lord Rokeby*, L.R. 8 Q.B. 255, L.R. 7 H.L. 744, the doctrine was extended to a Military Court of Inquiry. It was so extended on the ground that the case was one of an authorised inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act.

In the case from which I have quoted, an unsuccessful attempt was made to extend the immunity in question to the proceedings before a licensing board of the London County Council. Such a board, in the opinion of the Court, was a mere administrative body, not falling within the definition quoted.

The case of *Barratt v. Kearns*, [1905] 1 K.B. 504, appears to me to establish conclusively that the defendant, acting under this commission, is entitled to the protection claimed. Under a certain English statute not widely differing in its terms, and so far as I

can see in no way substantially distinguishable from the Act here in question, a commission was issued by the bishop of a diocese to inquire into the alleged inadequate performance by an incumbent of the ecclesiastical duties of his benefice. This, it was held, created a judicial tribunal and conferred absolute privilege, even though the commissioner could do no more than take evidence and report thereon to the bishop.

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In the New Zealand case of *Jellicoe v. Haselden* (1902), 22 N.Z.L.R. 343, the New Zealand Supreme Court held that a commissioner, acting under a commission issued by the Governor for the purpose of inquiring into certain charges made by a prisoner against the chief warden of the gaol, was not entitled to immunity. The decision was a majority decision of three Judges out of a court of five. The law which I have quoted was accepted by all. The case turned upon a careful and exhaustive analysis of the powers exercisable under the particular commission, the majority taking the view that the commissioner's powers were purely administrative, and in no sense judicial.

In *Georgeson v. Moodie*, 38 D.L.R. 105, the Supreme Court of Alberta held that the proceedings before a Commissioner appointed by the Lieutenant-Governor in Council under the Public Inquiries Act of that Province, were absolutely privileged.

I do not desire to review or refer in any detail to the earlier cases. *Dawkins v. Lord Rokeby*, *supra*, appears to me of the greatest possible value because it shews that, while the immunity in question is not to be in any way extended, the Court has no hesitation in holding that it exists where the tribunal in question is a public tribunal duly appointed by the Crown, and authorised and required to inquire judicially into and deal with a matter of public concern.

It was argued rather strenuously before us that the same test ought to be applied as where an application is made for prohibition. I cannot at all follow this argument. Prohibition will only lie to an inferior court or a judicial officer or tribunal of limited jurisdiction, including in this any person who is empowered by statute to pronounce a decree or judgment, or to impose a legal duty or obligation on another: *Godson v. City of Toronto* (1890), 18 Can. S.C.R. 36—a test widely different from that indicated in any of the cases to which I have referred, or any others which I have been able to find.

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It was also argued that the recent decision of *Shell Co. of Australia v. Federal Commissioner of Taxation*, [1931] A.C. 275, was in favour of this appeal. The inquiry there was whether a board of review created by the Australia Income Tax Assessment Act was an administrative body or a court. If a court, then its appointment was said to be unconstitutional, because, under the Constitution Act of Australia, members of a court were required to be appointed for life. The members of this board are appointed for a term of years only. The inquiry there was whether this board was a "court" in the strict meaning of that term or an administrative body. The holding was that it was an administrative body only.

In the course of the discussion, certain negative propositions were laid down (p. 297):—

"A tribunal is not necessarily a court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appeared before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a court. 6. Nor because it is a body to which a matter is referred by another body."

All these are indicia pointing to the body being a court, but individually and collectively they are not conclusive.

The matter is much discussed by text-writers. I find nowhere a more careful and satisfactory analysis of the situation than that in Spencer Bower on Actionable Defamation, 2nd ed., p. 85 *et seq.* His conclusion is that there is absolute protection "where the defamatory matter is published by any judicial officer, litigant, or witness, in the courts and for the purposes of any judicial proceeding." By "judicial proceeding" he means "any trial, hearing, inquiry, or investigation, by or before any judicial tribunal, whether in open court or in private, and whether of a final, or of an interlocutory or preliminary character, and whether *ex parte* or *inter partes*."

"Judicial tribunal," in his view, includes not only the well known courts, but "any other tribunal whatsoever, exercising in virtue of royal, statutory, or other lawful commission, warrant, grant, charter, or authority, and with apparent regularity, judicial functions as a court, but not any tribunal discharging merely ad-

ministrative or consultative functions, though acting according to judicial principles."

In a note he collects many instances of such judicial tribunals.

I would add a reference to *Burr v. Smith*, [1909] 2 K.B. 306, where the Court of Appeal held that an action for libel cannot lie against an official receiver in respect of observations on the affairs of the company in liquidation, published by him to the creditors and contributories of a company.

This case emphasises the impossibility of an individual discharging a duty cast upon him by the law of the land, if at all times he should be constantly in fear of actions against him by reason of that which he might do in the discharge of his duty.

The appeal should be dismissed with costs.

MULOCK, C.J.O., and MAGEE and GRANT, JJ.A., agreed with MIDDLETON, J.A.

*Appeal dismissed (HODGINS, J.A., dissenting.)*

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#### [APPELLATE DIVISION.]

#### BOASE V. PAUL.

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*Dentist—Extraction of Teeth—Exceeding Instructions—Negligence—Protection of Dentist—Dentistry Act, R.S.O. 1927, ch. 198, sec. 28—Application of—Time of Bringing Action—"Negligence by Reason of Professional Services"—Provisional Assessment of Damages—Excessive Amount.*

The judgment of ORDE, J.A. (1930), 66 O.L.R. 237, was affirmed, on the ground that the defendant was protected by sec. 28 of the Dentistry Act, what was done by him having been done "by reason of professional services," and the action not having been commenced "within six months from the date when . . . such professional services were terminated."

*Semle*, the amount of damages provisionally assessed by the trial Judge upon the plaintiff's claim was excessive, having regard to the fact that the extraction of his teeth was in fact a benefit to him.

*Per MAGEE, J.A.*:—Negligence in taking instructions was to be deemed negligence within the provisions of the Act.

*Per HODGINS, J.A.*:—Taking the trial Judge's finding that the plaintiff's instructions were clearly given and that the misunderstanding was that of the defendant, it follows that the negligence of the defendant was that he went beyond his retainer and did damage to the plaintiff by the extraction of his teeth, which was not within the scope of his employment, and the retention of the teeth was quite within the plaintiff's right; and the damage was the foundation of the action.

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AN appeal by the plaintiff from the judgment of ORDE, J.A. (1930), 66 O.L.R. 237.

April 22 and 23. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*J. C. McRuer*, K.C., for the appellant, contended that the defendant admitted in evidence that the appellant did not consent to having all his upper teeth extracted; therefore the act of extracting these teeth amounted to an assault for which the defendant was liable in damages: *Schloendorff v. New York Hospital* (1914), 211 N.Y. 125. Section 28 of the Dentistry Act, R.S.O. 1927, ch. 198, takes away common law rights, and therefore ought to be very strictly construed: *Lightwood's Time Limit on Actions*, p. 2. As soon as the defendant put his finger in the appellant's mouth for the purpose of extracting the teeth, the extraction of which the appellant had not consented to, the defendant committed a trespass for which he is liable in damages. The fact that the teeth were defective merely mitigates the amount awarded. The amount awarded at the trial does not adequately compensate the appellant for the injury which he has suffered: *Township of Brock v. Toronto and Nipissing Railway Co.* (1875), 37 U.C.R. 372. The respondent did not obtain the consent necessary to make his act a lawful one: *Tench v. Great Western Railway Co.* (1872), 32 U.C.R. 452; *Prendergast v. Grand Trunk Railway Co.* (1866), 25 U.C.R. 193.

*I. F. Hellmuth*, K.C., and *Lyle Ramsey*, for the defendant, respondent. The Dentistry Act is not a statute respecting limitations, it is a protective Act: *Miller v. Ryerson* (1892), 22 O.R. 369, 373. The learned trial Judge held that the respondent misunderstood the appellant's instructions. This amounts to negligence on the part of the respondent while rendering professional services. It is such negligence as this that the Act was intended to cover. This action was not maintainable, as it was not brought within six months from the date of the commission of the negligent act, as required by sec. 28 of the Act. The evidence of the appellant shews that he mistakenly thought that Dr. McDonagh had explained to the respondent which tooth was to be extracted. As a result of this erroneous belief, the appellant failed to explain clearly to the respondent, which tooth was to be extracted. The appellant has enjoyed much better health since having the teeth

extracted. None of the teeth which the respondent extracted could have been saved. They were very badly infected.

*McRuer*, K.C., in reply. The Dentistry Act applies only to cases of negligence or malpractice. The present case does not come within the provisions of the Act, as it is one of trespass.

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June 15. *MULOCK*, C.J.O.:—For the reasons mentioned in the judgment of my brother *Hodgins*, I think this appeal should be dismissed with costs. But, before parting with it, I would refer to one phase of the case which, in my opinion, goes a long way toward relieving the defendant from the charge of negligence.

The learned trial Judge has fairly discussed the conflicting evidence as to what instructions were given by the plaintiff to the defendant. The onus was upon the defendant to prove that the plaintiff authorised him to extract all his upper teeth.

The evidence of the plaintiff was in substance as follows: In the course of a brief conversation with the defendant immediately before the operation, he handed to him an X-ray plate which shewed, marked with an arrow, the tooth which he wished the defendant to extract, and then just before the operation he told the defendant that his regular dentist, *Dr. McDonagh*, had advised him it would be better if all the upper teeth were extracted, but he added he was going a long trip and would not think of having this done.

The evidence shewed that the diseased condition of all the upper teeth was such as to imperil the plaintiff's health, if not his life, and called for their immediate removal.

Following the plaintiff's reference to this opinion of *Dr. McDonagh*, the defendant examined the plaintiff's mouth and then saw the condition of the teeth and must have realised that the plaintiff's health demanded their immediate removal. These two circumstances, I think, caused the defendant not unreasonably to assume that the plaintiff desired their removal, whereupon he did what was in the best interests of the plaintiff; nevertheless he seems to have misinterpreted the plaintiff's instructions and thus committed an actionable wrong. It caused no damage to the plaintiff, but on the contrary was a benefit to him, and if he were entitled to maintain this action he would, in my opinion, be entitled to merely nominal damages.

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MAGEE, J.A.:—When intentional injury is eliminated, I see no reason why in such a case as this negligence in taking instructions should not be deemed negligence within the purview of the Dentistry Act, and action therefor barred by lapse of time like other actions for negligence therein dealt with. I would therefore dismiss the appeal.

HODGINS, J.A.—Appeal by the plaintiff from the dismissal of his action by Orde, J.A., after a trial before him without a jury.

The action was for what the plaintiff's counsel described as an assault, the assault being the act of the defendant, a dentist, in extracting all the plaintiff's upper teeth instead of removing only the one which the plaintiff desired.

The findings of the learned trial Judge are to the effect that there was a misunderstanding by the defendant of the plaintiff's exact wishes, but that if what the plaintiff actually said had been properly understood only one tooth would have been removed.

The defendant pleads in bar of the action the provisions of the Dentistry Act, R.S.O. 1927, ch. 198, sec. 28, which reads:—

“No duly registered member of the Royal College of Dental Surgeons shall be liable to any action for negligence or malpractice, by reason of professional services requested or rendered, unless such action is commenced within six months from the date when in the matter complained of such professional services terminated.”

There can be no doubt that what was done by the plaintiff was in the exercise of his profession, and whether it was by mistake, inadvertence or carelessness, the act complained of in its derivation and character must still be regarded as having arisen and happened “by reason of professional services.” Professional services were undoubtedly rendered, though by mistake or through inadvertence. The only question which remains, in applying the statute, is whether this is an “action for negligence or malpractice.”

Taking the learned trial Judge's finding that the plaintiff's instructions were clearly given and that the misunderstanding was that of the defendant, it follows that the negligence of the defendant was that he went beyond his retainer and did damage to the plaintiff by the extraction of the teeth, the removal of which was not within the scope of his employment, and the retention of which was quite within the plaintiff's right. In this case, this damage, such as it was, is the foundation of the action.

If the defendant, intending to remove one tooth only, went on and removed eleven more because he forgot his instructions, or because he thought it advisable and beneficial, he would be either careless or neglectful or overzealous in the performance of his professional services. The other expression used in the statute is "malpractice." The meaning of this, as expressed in various dictionaries, is fairly comprehensive.

The following definitions of the word "malpractice" have been given:—

*Concise Oxford Dictionary* (1929): "Physician's improper or negligent treatment of patient."

*Murray's English Dictionary*: "Improper treatment or culpable neglect of a patient by the physician."

*Funk & Wagnall's Standard Dictionary*: "Improper treatment or management of a case of disease or of injury, or such treatment as produces injury."

*Mozley & Whiteley's Law Dictionary*, 3rd ed. (1908): In this work malpractice or "*mala praxis*" is thus defined: "Improper or unskilful management of a case by a surgeon, physician or apothecary whereby a patient is injured; whether it be by neglect or for curiosity or experiment."

But I think that, apart from definitions, the pith of the enactment is to give protection to professional men who are registered members of the Royal College of Dental Surgeons, after the lapse of six months, against liability for mistakes, negligence, or improper treatment of a patient if the cause of action arose out of or in the course of professional services either requested or rendered under an implied contract, or under a mistaken interpretation of that express or implied contract.

I would therefore dismiss the appeal.

It is not necessary to discuss the quantum of damages. But, as the gist of the action is that the injury was caused by the wrongful treatment by which a patient is rendered worse instead of better (*Gladwell v. Steggall* (1839), 5 Bing. N.C. 733; *Ruddock v. Lowe* (1865), 4 F. & F. 519), there seems little foundation for the amount awarded.

MIDDLETON, J.A.:—I agree with my brother Hodgins that the statute operates to protect the defendant against this action. I think the intention of the Legislature was that any action should be brought within a limited period when it was in any way based

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App. Div. upon the relation of dentist and patient. If there is any action-  
 1931. able wrong after that relationship is established, it falls under  
 the head of "negligence or malpractice."

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 Middleton, J.A. I cannot conceive it possible that the Legislature intended that  
 the statute should not have application in any case in which it  
 might have been possible to have framed a count at common law  
 based upon an assault. That would unduly limit the language  
 used.

In any case I would not be prepared to support the assessment  
 of damages made by the learned trial Judge. Inasmuch as he dis-  
 misses the action, the tentative assessment made by him is of no  
 binding effect upon this Court. If our opinion had been in favour  
 of the plaintiff, it would have been our duty to assess damages.  
 From the evidence given it is plain that the plaintiff's condition  
 was serious. To avoid blood-poisoning and death, he would have  
 had to undergo precisely the operation which took place. The  
 condition of disease and decay could not have long continued with-  
 out a fatal end, if not relieved by some curative measure. He has  
 been spared the doubtful pleasure of anticipation, and I should  
 not have been prepared to give more than nominal damages.

GRANT, J.A., agreed with MIDDLETON, J.A.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

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KUHMO AND LAAKSO V. HELBERG.

June 15.

*Negligence—Motor-vehicles upon Highway—Collision—Injury to Plain-  
 tiffs' Car by Defendant's Car Driven by Unauthorised Person—  
 Possession without Owner's Consent—Highway Traffic Act, sec.  
 41(1).*

The defendant, the owner of a motor-car, refused to let M. have or  
 hire it unless the defendant's chauffeur (P.) was taken along to  
 drive it. During the journey M. got drunk and insisted on driving  
 the car. He was resisted by P., who, though not actually ejected  
 by force, was threatened with a fight and gave way. While M. was  
 driving on a highway the car struck the plaintiffs' car and dam-  
 aged it:—

*Held*, in an action to recover damages, that the change of opera-  
 tors was due to duress and brought about a situation contrary to  
 the defendant's express instructions and the bargain made with  
 M.; and, the car being "in the possession of some person other than  
 the owner or his chauffeur, without the owner's consent" (Highway

Traffic Act, R.S.O. 1927, ch. 251, sec. 41(1)), the defendant was not liable.  
 Review of the authorities. *Le Bar v. Barber and Clarke* (1922), 52 O.L.R. 299, followed.

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AN appeal by the defendant from the judgment of McKAY, Dist. Ct. J., sitting in the First Division Court of the District of Thunder Bay, in favour of the plaintiffs for the recovery of \$200 damages in an action for negligence.

The plaintiffs alleged that they were driving an automobile owned by them on a highway in the city of Port Arthur on the 27th August, 1930, when an automobile owned by the defendant, and in charge of the defendant's servant and agent Ray Peterson, and driven by one John Moline, struck the plaintiffs' automobile and occasioned substantial damages to their vehicle and to the plaintiffs themselves.

The defendant denied that he was responsible to the plaintiffs for the accident, on the ground that the automobile was taken by Moline without the defendant's permission and against his express prohibition, and denied that his vehicle was at the time of the accident in the custody or control of Ray Peterson.

May 20. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*Hamilton Cassels*, for the appellant, contended that the learned trial Judge erred in holding that Peterson, an employee of the defendant, was in possession of the car when the accident occurred. The arrangement made by the defendant was that Moline was allowed to hire the car only on the condition that Peterson should drive it. The fact that Moline, in an intoxicated condition, insisted on driving, against Peterson's will and on threat of violence, relieves the defendant from liability towards the plaintiff. Reference to the Highway Traffic Act, R.S.O. 1927, ch. 251, secs. 41 and 41a., and amendments of 1929, 19 Geo. V. ch. 68, sec. 9; and 1930, 20 Geo. V. ch. 48, sec. 10; *Boyd v. Smith* (1930), 66 O.L.R. 137, and (1931), ante 361; *Hirshman v. Beal* (1916), 38 O.L.R. 40; *Walker v. Martin* (1919), 45 O.L.R. 504; *Le Bar v. Barber and Clarke* (1922), 52 O.L.R. 299.

No one appeared for the plaintiffs, respondents.

June 15. The judgment of the Court was read by HODGINS, J.A.:—Appeal by a car-owner against a judgment in favour of

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strangers whose car was injured by the defendant's car while driven by some one not authorised by the owner.

The question in issue here depends on which view of the statute is taken: whether, on the one hand, the intention of the Act is "to treat the vehicle as a dangerous article, the possession of which the owner must not entrust to another except with the consequent responsibility for violations of the Act committed by him, regardless of whether or not at the time the violation occurred he was acting in contravention of the terms of the arrangement on the faith of which the possession of the vehicle had been entrusted to him:" *LeBar v. Barber and Clarke*, 52 O.L.R. 299, at p. 306; or "how can it be said that the possession of a motor-car, when used in a way entirely inconsistent with the undertaking upon which possession was delivered and in an employment radically different in kind from that contemplated by the owner, is within the provisions of the statute?" *ib.*, at p. 302.

In that case the latter view prevailed. It has been followed in later cases. In *Wainio v. Beaudreault* (1927), 61 O.L.R. 356, a car had been hired from a garage on the definite stipulation and arrangement between D., the garage-owner, and B., that no other person than B. should drive it. B. allowed another person to operate the car with the result that an accident happened by the negligence of the substituted driver. Masten, J.A., speaking for the Second Divisional Court, says (p. 362):—

"There was no express consent, and any implication of a consent—that is, that Bredenberg might transfer the possession and control of the car to some one else—is negatived by the express terms of the arrangement under which Dickson lent the car to Bredenberg."

And adds that "the owner of the car consented and intended that the car should go upon the highway, but he expressly limited his consent to its going upon the highway in the possession and under the control of Bredenberg with whose skill and ability as a driver he was well acquainted, and, as I have already indicated, with an express prohibition against its transfer to another."

In *Henderson v. Tudhope* (1930), 65 O.L.R. 238, in the absence of authority from the owner to the driver to permit another employee to drive it, Riddell, J.A., in delivering the judgment of the Divisional Court, says (p. 240):—

“The law in such a case is clearly laid down in *Beard v. London General Omnibus Co.*, [1900] 2 Q.B. 530: the servant of the company driving its omnibus allowed another employee to drive; he was negligent and caused an accident: it was held that, in the absence of authority to the driver to entrust another employee with the duty of driving the omnibus, the company was not liable. This case is not at all shaken or questioned in the later case of *Ricketts v. Thos. Tilling Ltd.*, [1915] 1 K.B. 644.”

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And at p. 241:—

“I accept as law the test laid down by Buckley, L.J., in *Ricketts v. Thos. Tilling Ltd.*, *ut supra*, at p. 548:—

“If the act which was done by a person who ought not to have done it, was not done by reason of any act of negligence on the part of the person authorised to do the act, then it must be proved that the person who did the act was the agent of the master in doing it.”

“Here Drage was authorised to drive the car, and he authorised Tudhope to drive it in his stead; if Drage was guilty of negligence in so authorising Tudhope to drive the car, it might be that the company would be liable; but no negligence of the kind appears; and ‘it must be proved that the person who did the act was the agent of the master in doing it.’ This was not so much as attempted to be proved, it being thought that the ownership of the car was sufficient to fix the company with liability if its car did the mischief.”

In the case at bar the defendant refused to let Moline have or hire the car unless the defendant’s chauffeur Peterson was taken along to drive it. Applying the law as set out above, the driving of the car by Moline was wholly unauthorised, in fact it was directly in the teeth of the terms on which the car was allowed to leave the garage. It went merely to convey him where he wanted to go, while equipped with a driver. During the journey Moline got drunk and insisted on driving himself. He was resisted by Peterson, who, though not actually ejected by force, was threatened with a fight, and gave way. This is not negligence, but rather giving way to anticipated force. In other words, the change of operators was due to duress and brought about a situation distinctly contrary to the defendant’s express instructions and the bargain made with Moline. If fraud or force had been used to enable Moline to oust Peterson, there would be no doubt that the

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statute would not make the defendant liable, and if duress is used to accomplish the same the legal result should not be different.

In my judgment the words of the present Act, the Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 41(1), "in the possession of some person other than the owner or his chauffeur, without the owner's consent," exactly cover the case, and I would allow the appeal and dismiss the action, both with costs.

*Appeal allowed.*

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[APPELLATE DIVISION.]

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REX v. CRACKNELL.

June 15.

*Criminal Law—Murder—Judge's Charge—Allusion to Clemency of Crown—Effect upon Jury—Defence of Insanity—Misinterpretation of sec. 19 of Criminal Code—Misdirection—New Trial.*

Upon an indictment of the accused for the murder of his wife, the defence was insanity. There was a conflict of evidence as to whether he, when he shot his wife, was labouring under such mental imbecility or disease of the mind as, within the meaning of sec. 19 of the Criminal Code, would constitute a defence, and in his charge the trial Judge told the jury that, if they found murder, on representation at Ottawa the man's sentence would be reduced perhaps to imprisonment for life, but that that was not to influence their verdict:—

*Held*, that practically telling the jury that, if their verdict should be murder, the death sentence would be commuted, weakened the protection which the law affords an accused and deprived him of a legal right, and thus caused a miscarriage of justice; nor was the effect neutralised by the subsequent statement that they need not be influenced by what had been said.

Under sec. 19 of the Criminal Code, no person shall be convicted by reason of an act done or omitted when, from natural imbecility or disease of the mind, incapable of appreciating the nature and quality of the act or omission *and* of knowing that it was wrong.

The trial Judge told the jury that the defence must not only prove that the accused did not appreciate the nature and quality of the act, but, in addition, must prove that he did not know it was wrong:—

*Held*, following *McNaghten's Case* (1843), 12 Cl. & F. 200, that this was an error and that if the accused did not know he was doing what was wrong he was not guilty, even though he might have appreciated the physical not the moral nature and quality of his act. The word "and" after "omission" in sec. 19 should not in this case be construed literally.

THE accused was indicted for the murder of his wife, Alice Cracknell, pleaded not guilty, and was tried before RANEY, J., and a jury, found guilty, and sentenced to death. There was no appeal to the Court from the conviction, but application was made on the accused's behalf for the mercy of the Crown, whereupon the Minister of Justice, in exercise of the powers conferred upon him by sec. 1022, subsec. 2, para. (b), of the Criminal Code, referred the whole case to "The Court of Appeal of Ontario" (meaning the Appellate Division of the Supreme Court of Ontario), and thus the case came before the Court to be heard and determined as if it were an appeal by the accused from his conviction.

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June 1. The case was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

A. L. Hannah, for the accused. The learned trial Judge ought to have informed the jury that, if they were of the opinion that the delusions from which the prisoner was suffering affected his actions, and that by reason of his mental state he was not able to resist them, he was not responsible for the crime which he committed. The trial Judge erred in stating that the onus was upon the defence to disprove that the accused knew what he was doing *and* that he knew that what he was doing was wrong. The defence need only prove that the accused did not know the nature and quality of the act which he committed: *Rex v. Jessamine* (1912) 19 Can. Crim. Cas. 214, 218; Archbold's Criminal Pleading Evidence and Practice, 28th ed., p. 16. The alienists, in giving evidence, stated that, in their opinion the accused was "insane," whereas the trial Judge, throughout his charge to the jury, referred to the accused's mental condition as "disease of the mind." These expressions, no doubt, would convey totally different meanings to the minds of the jurymen. The word "insane" is much more expressive than the phrase "disease of the mind." It is a fair assumption that the trial Judge created doubt in the minds of the jurymen as to the question of the prisoner being actually insane at the time of the commission of the crime. The trial Judge erred in stating to the jury that "on representation at Ottawa the man's sentence would be reduced to perhaps imprisonment for life." It is a fair assumption that that statement was an inducement to the jury to bring in a verdict of guilty: *MacAskill v. The King*, [1931] S.C.R. 330; *McNaghten's Case* (1843), 10 Cl. & F. 200.

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*Edward Bayly*, K.C., for the Crown. The evidence clearly shews that the accused knew what he was doing at the time he committed the crime, and that what he was doing was wrong. The jury disbelieved the evidence of Dr. Chalk that the accused did not know the nature and quality of his act. Obviously the witness did not mean what he said. The trial Judge, in his charge to the jury, used the words of sec. 19 of the Criminal Code; therefore it cannot be said that the jury was misdirected. After reading the whole of the charge, one cannot say that the jury was induced to bring in a verdict of guilty by reason of the trial Judge's improper remarks. Reference to *Rex v. Anderson* (1914), 22 Can. Crim. Cas. 455.

June 15. MULLOCK, C.J.O. (after stating the position of the case as above) :—On the 4th November, 1930, the accused killed his wife by shooting, and on his trial for murder, in support of the plea of not guilty, sought to prove such circumstances as, within the meaning of sec. 19 of the Criminal Code, would constitute a defence. There was a conflict of evidence as to whether the accused when he shot his wife was labouring under such mental imbecility or disease of mind as, within the meaning of sec. 19, would constitute a defence, and in his charge to the jury the learned trial Judge, after discussing the evidence, said:—

“If you find murder, I have no doubt at all that I might as well say this to you, that on representation at Ottawa the man's sentence would be reduced to perhaps imprisonment for life, because I do not think that public opinion in this country would approve of the hanging of a man who was declared by the Crown's own evidence to have been of a diseased state of mind at the time when the crime was committed. Now you need not let that influence your verdict one way or the other, for it is merely an aside, something that I have said to you by way of suggesting what would probably happen if a verdict of murder is returned, which is what usually happens in these cases when a verdict of murder is returned against a man of unstable mentality, and here you have the instability established beyond, I should think, peradventure.”

The statutory sentence of death which must follow a finding of guilty of murder casts upon juries the duty of exercising the greatest care in weighing the evidence and in refusing to convict

unless satisfied beyond reasonable doubt of the guilt of an accused. The law entitles the accused to the protection which the proper observance of that duty affords him, and the practically telling by the Judge to the jury that, if they should bring in a verdict of murder, the sentence would be commuted, must have weakened such protection and have deprived him of a legal right, and thus, in my opinion, have caused a miscarriage of justice. Nor do I think the effect of such telling was neutralised by the learned Judge's subsequent statement to the jury that they need not be influenced by what he had stated. Further, after so advising them, he, as the above quotation shews, in substance repeated what he had already told them. Nothing irrelevant or foreign to a case should be allowed to unbalance the scales of justice. I am of opinion that this verdict should be set aside and a new trial had.

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Further, before parting with the case, I would, with respect, point out an error of the trial Judge in his interpretation of sec. 19 of the Criminal Code, an interpretation which, however, did not prejudice the accused.

The learned trial Judge told the jury that "the defence must not only prove that the accused did not appreciate the nature and quality of the act, but in addition must prove that he did not know that the act was wrong." Section 19 of the Code reads as follows:—

"No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission and of knowing that such an act or omission was wrong."

This section is in the very words of sec. 11, subsec. 1, of the Act entitled the Criminal Code (1892), and the question is whether the word "and" before the words "of knowing" is to be interpreted literally or as meaning "or." This section is in the exact words of one of the rules in *McNaghten's Case*, 10 Cl. & F. 200, except that it substitutes the word "and" for "or." That this change was a mistake on the part of the draughtsman appears to me obvious. It is a fundamental principle that *mens rea* is an essential element in crime. If absent there is no crime. Here, if the accused did not know that in killing his wife he was doing

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what was wrong he had no guilty intention and therefore was not guilty of murder, even though he might have appreciated the physical not the moral nature and quality of his act: *Rex v. Hadfield* (1800), 27 St. Tr. 1281. Thus, in order to establish his defence it was not necessary to prove both incapacity to appreciate the nature and quality of his act and also absence of guilty intent. In my opinion in the present case the word "and" should not be construed literally.

MAGEE, J.A.:—In this case of an alleged murder the defence set up with which we have to deal was that of insanity. The answer of the Judges to the second and third questions of the House of Lords in *McNaghten's Case*, 10 Cl. & F. 200, at p. 210, expressly stated that, "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." They went on to say that the general mode of putting to the jury the question whether the accused knew the difference between right and wrong, while seldom leading to any mistake with the jury, is not so accurate when put generally and in the abstract as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. They added that if the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it, and if the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and they considered the usual course of leaving to the jury the question whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong was correct accompanied with such observation and explanation as the circumstances of each particular case might require. Thus the learned Judges clearly declared that to be relieved from responsibility for an alleged offence there must be established defect of

reason in one or other of two respects, namely, not knowing the nature and quality of the act or not knowing that the act was wrong.

In the present case the jury were directed that defect in both respects was necessary. In so directing them the learned Judge had in mind sec. 19 of the Criminal Code, which enacts that no person shall be convicted if defect in both respects existed.

But this did not say that unless defect in both existed he should be convicted. In so serious a matter it cannot be implied that the common law has been changed without clear enactment, and it must be taken that that law as declared by the Judges is still the law in Canada. In England in *Rex v. Flavell* (1926), 19 Cr. App. R. 141, it was declared that the rules in *McNaghten's Case* still stand. The direction to the jury in the present case was made without reference to the established and unrepealed rule and was not in accordance with it.

There should in my view be a new trial.

HODGINS, J.A.:—I think a new trial should be had owing to the probable influence of the reference to executive clemency by the learned trial Judge. As to sec. 19 of the Criminal Code. I think it does not, in this case, require both elements mentioned to be found. If the nature and quality of the act is not known to the accused so that his mind does not grasp its physical character, it is idle to inquire if he knew the act to be wrong.

MIDDLETON and GRANT, J.J.A., agreed with MULOCK, C.J.O.

*New trial ordered.*

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## [APPELLATE DIVISION.]

RE HOLLINGER CONSOLIDATED GOLD MINES LTD. AND  
TOWNSHIP OF TISDALE.

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June 15.

*Assessment and Taxes—Assessment of Buildings Plant and Machinery on Mineral Lands—Appeals from Order of Ontario Railway and Municipal Board—Assessment Act, sec. 40(4)—Mining Act, sec. 1(n)—Exemptions—Portion of Plant Constructed on Mining Lands of others under Mere Licence.*

The interpretation which should be placed upon the words "used mainly for obtaining minerals from the ground," in sec. 40(4) of the Assessment Act, R.S.O. 1927, ch. 238, is that it was thereby intended to relieve from municipal taxation all buildings, plant and machinery, situate upon mining lands, which form an essential part of the system actively in operation in obtaining the minerals. There is no intention to narrow the construction of the language used so as to cover only that which is used directly, and not merely indirectly, in getting out the minerals. The use of the word "mainly" shews that too strict an interpretation is not intended to be placed upon the language used.

No appeal lies to the Appellate Division from any decision of the Ontario Railway and Municipal Board upon a question of fact: see sec. 83, subsec. 6.

The Mining Act, R.S.O. 1927, ch. 45, which for this purpose may be considered *in pari materia*, defines mining lands in sec. 1(n); and the Board's decision that the land in question upon the appeal was "mineral land" within the meaning of sec. 40(4), being a decision upon a question of fact, the Court was precluded from interfering therewith.

The above interpretation was applied to the different portions of the plant assessed upon the lands of the H. company; and power-lines for electric railway to powder-magazine, electric railway to pump-house and powder-magazine, and other portions of the plant, were declared exempt.

The conveyor system, covering the transportation of gravel or sand for use in the mines as filling, was essential to the obtaining of the mineral, and therefore was exempt.

*Town of Ford City v. Ford Motor Co. of Canada Ltd.*, [1929] S.C.R. 490, applied.

Portions of the conveyor system and of the electric railway and power-line were constructed over mining lands which were the property of other persons or companies from whom the H. company had, at the most, a mere licence:—

*Held*, that those portions of the plant were not assessable under the Assessment Act as the mining lands of the H. company; and, if they were chattel property, as such they were not assessable,

AN appeal by the township municipality and a cross-appeal by the mines company from an order of the Ontario Railway and Municipal Board, pronounced on appeal from an order of the

Judge of the District Court of the District of Temiskaming on an appeal from the decision of the Township Court of Revision in respect of the assessment of certain property of the mines company situate in the township.

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May 4, 5, and 6. The appeal and cross-appeal were heard by MULLOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*Peter White*, K.C., and *Everett Bristol*, K.C., for the township corporation. The quantum of assessment is not in dispute, but only the question whether the items come within the language of the Assessment Act, R.S.O. 1927, ch. 238, sec. 40(4). The change-house does not come within the language of this section and should not be exempt. In construing the Act the exemptions must be within the express provisions, which should not be enlarged. The change-house, although it may be an essential equipment of the mine, is not used "mainly for obtaining minerals from the ground:" *Re Bruce Mines Ltd. and Town of Bruce Mines* (1910), 20 O.L.R. 315. The boiler-house is in the same category. The 50 per cent. which is used to heat the shaft-house is properly exempt, but the 50 per cent. which is used to heat the change-house is not exempt. The slimes disposal plant should not be exempt. It is not a concentrator or part thereof, and the disposal of the slime does not take place on mineral land: *Re MacIntyre Porcupine Mines Ltd. and Morgan* (1921), 49 O.L.R. 214; *Foster v. Township of St. Joseph* (1917), 39 O.L.R. 114 and 525. The powder-magazine, heating system, and telephone system are all assessable because they are not on mineral land. The gravel conveyor system is assessable because it is not on mining land and because the gravel is used for filling the mine and not for the purpose of obtaining minerals from the ground. To be exempt it must be used directly in obtaining ore. No matter how necessary it may be, if used indirectly it does not come within the language of the exemptions, and the language should not be so extended. It must be noted that the language of sec. 40(4) differs from that of sec. 19. Evidently the intention of the Legislature was not to include everything used in the mining operations.

*R. S. Robertson*, K.C., and *P. C. Finlay*, for the mines company. The general rule is that statutes should be given a fair and liberal interpretation: *Re MacIntyre Porcupine Mines Ltd. and*

App. Div. *Morgan, supra*. Section 19 refers only to machinery. The Legislature did substantially intend by sec. 40(4) to exempt everything used in carrying on the mining operations. The change-house and boiler-house are necessary for the benefit of the men engaged in the operation of the mine, and come within the language of the section. As to the powder-magazine there is evidence that it is situate on mineral lands, and the Board must be assumed to have found that as a fact in granting the exemption. If the Board did not so find, then this Court has no jurisdiction to make a finding of fact under sec. 83(6) of the Assessment Act, and the appeal must fail. The power lines and equipment and electric railway cross lands not owned by the mines company, under an oral agreement with the owners amounting merely to a licence and not to an easement: *Goddard on Easements*, 8th ed., p. 4. In so far as it is not on the mines company's lands it cannot be assessed to it. In any event the whole system is chattel property and therefore not assessable: *Re City of Ottawa and Ottawa Electric Railway Co.* (1922), 52 O.L.R. 664. The gravel conveyor system has no purpose except to assist in the recovery of minerals from the ground. As to its location it is in the same position as the railway. The sand and gravel pit itself is mineral land: *Mining Act*, R.S.O. 1927, ch. 45, sec. 1(n); *Midland Railway Co. v. Haunchwood Brick and Tile Co.* (1882), 20 Ch. D. 552; *Attorney-General v. Salt Union Ltd.*, [1917] 2 K.B. 488; sec. 161, rule 121, of the *Mining Act* regulates the working of sand and gravel pits.

*White, K.C.*, in reply. As long as the land is occupied, whether as of right or otherwise, the occupier is a tenant under the Act, and assessable as such: *Belleville and Prince Edward Bridge Co. v. Township of Ameliasburg* (1907), 15 O.L.R. 174; *New York and Ottawa Railway Co. v. Township of Cornwall* (1913), 29 O.L.R. 522; *A. J. Reach Co. v. Crosland* (1918), 43 O.L.R. 209.

June 15. The judgment of the Court was read by GRANT, J.A.:—An appeal by the township municipality and a cross-appeal by the mines company from a judgment dated the 28th October, 1930, of the Ontario Railway and Municipal Board, on an appeal from the District Judge at Cochrane, whose judgment was pronounced on the 19th September, 1929, on an appeal from a decision of the Township Court of Revision (5th June, 1929), in

respect of the assessment of certain property of the mines company, situate in the said township. App. Div.  
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There were three principal assessments in controversy, memorandum of which was furnished to us by counsel, consisting of:— RE  
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1(a) Change-house, in which the assessment was disallowed by the Board, and from which decision the township appeals.

1(b) Boiler-house, heating system, as to which the assessment was confirmed by the Railway Board, and the mines company appeals.

2. Slimes disposal system, electric railway, powder-magazine, etc., subdivided as follows:—

(a) Pump-house and machinery, transformers, pipe-lines, and installation, as to which the County Court Judge and the Railway Board agreed in disallowing the assessment, and the township now appeals.

(b) Power-lines and equipment, etc., for electric railway to powder-magazine. Assessment confirmed by the Board, and the mines company appeals.

(c) Electric railway to pump-house and powder-magazine. Assessment confirmed and the mines company appeals.

(d) Powder-magazine.

(e) Heating system for magazine.

(f) Telephone system to disposal plant.

In these three, the assessment was disallowed by the Board, and the township appeals.

3. Gravel conveyor system:

(a) Dwellings, etc., at gravel-pit. Assessment confirmed and no appeal.

(b) Compressor-house, oil-house, lighting station, transformers, railway track, power-lines, and conveyor system, including steel towers, cables, etc. in respect of which the assessment was disallowed by the Railway Board, and the township appeals.

Upon the argument before us the appeal of the township in respect of 1(a) change-house, 2 (a) pump-house, etc., was dismissed; and the appeal of the mines company in respect of 1(b) was allowed.

App. Div.      The principal statutory provision for consideration is to be  
 1931.      found in the Assessment Act, being R.S.O. 1927, ch. 238, sec. 40,  
 RE      subsec. 4:—  
 HOLLINGER,      “The buildings, plant and machinery in, on or under mineral  
 CONSOLIDATED GOLD      land, and used mainly for obtaining minerals from the ground, 'or  
 MINES LTD.      storing the same, and concentrators and sampling plant, and, sub-  
 AND      ject to subsection 8, the minerals in, on or under such land, shall  
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The provision limiting the powers of an appellate court on an appeal such as this from the Ontario Railway and Municipal Board is to be found in sec. 83, subsec. 6, which reads as follows:—

“An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Municipal Board.”

No appeal lies to this Court from any decision of the Board upon a question of fact.

We have therefore to consider whether the subject-matter of the assessments consists of buildings, plant, or machinery, on mineral land, and is used mainly for obtaining minerals from the ground or storing the same, or whether they form part of the concentrator in use by the mines company.

There does not appear to be any definition given in the Assessment Act of “mineral land,” but I note that under the Mining Act, R.S.O. 1927, ch. 45, which for this purpose may be considered *in pari materiâ*, the words “mining lands” are defined in sec. 1(n), which says:—

“‘Mining Lands’ shall include lands and mining rights patented or leased under or by authority of any statute, regulation, or Order in Council, respecting mines, minerals or mining, and also lands or mining rights located, staked out, used or intended to be used for mining purposes.”

In construing the statutory provision contained in sec. 40(4), it is not to be overlooked that the mines company does not, by virtue of this provision, escape taxation altogether. The taxation of mining companies is provided for in the Mining Tax Act, which is ch. 28 of R.S.O. 1927, and the taxation under that statute takes

the place of the taxation which, in the absence of the provision contained in the Assessment Act above recited, would have been enforceable in respect of the company's property.

With respect to all of the items which are the subject of appeal, the evidence and the only evidence to which our attention has been called is to the effect that all the lands in question are lands which have been patented or leased or located as mining claims.

Upon the evidence which was adduced, and upon the findings made by the Ontario Railway and Municipal Board, it appears to me quite clear that the Board must be taken to have decided that the lands in question were mineral lands, within the meaning of sec. 40, subsec. 4; and, as their finding in that regard is one of fact, this Court is precluded from interfering therewith. Had this question of fact come before us as a court of first instance, or with authority to make a finding upon the point, I would, without hesitation, find that all these lands are mineral lands within the meaning of the subsection.

There remains to be considered the question whether or not the buildings, plant, and machinery under consideration are "used mainly for obtaining minerals from the ground," or form part of the concentrator.

Reverting to the individual items, the first of these not already disposed of forms part of No. 2, consisting of 2(b) power-lines, etc., for electric railway to powder-magazine; 2(c) electric railway to pump-house and powder-magazine; 2(d) powder-magazine, etc.; 2(e) heating system for magazine; 2(f) telephone system.

The last item is a matter of \$50 only, and is of no material importance. The others may conveniently be considered together, as in my view they are all practically in one class.

The view which I take of the interpretation which should be placed upon the words "used mainly for obtaining minerals from the ground," is that it was thereby intended to relieve from municipal taxation all buildings, plant and machinery, situated upon mineral lands, which form an essential part of the system actively in operation in obtaining the minerals. I do not think that there is here manifested any intention to narrow the construction of the language used, as was contended by counsel for the municipality, so as to cover only that which is used "*directly*," and not

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merely indirectly, in getting out the minerals. If that narrow interpretation were to be adopted, only plant and machinery could be included, and only such plant and machinery as were actually in direct use in extracting the minerals. No buildings could be covered at all, because buildings are not used directly for taking out minerals, but merely for housing or covering in the shaft or other plant or machinery. Explosives have to be kept somewhere, and the Mines Act makes express provision for their safe-keeping; they are an absolute essential to the getting out of the ore, but, if the narrow interpretation were to obtain, the place where, by the Mines Act, the explosives have to be stored, would not come within the exemption.

Many other illustrations would come readily to one's mind of buildings and plant which are absolutely necessary to the working of the mine, but which are not used directly in taking out the mineral. I do not think it was ever intended that so narrow an interpretation should be placed upon the language used. It is to be noted in this connection that the subsection contains the word "mainly," when stating the use to which the plant and machinery may be put, shewing, as it appears to me, that too strict an interpretation was not intended to be placed upon the language used.

The property mentioned in these items would all come within the above category, as being essential to the operation of the mine; the evidence being that they were used for that purpose alone.

I would therefore allow the appeals of the mines company, with respect to 2(b) and 2(c) and dismiss the appeal of the township with respect to the other items.

Number 3(b) has to do with what is spoken of generally as the conveyor system, covering the transportation of gravel or sand for use in the mine as filling, to take the place of the ore and rock removed in the mining operation, so as to prevent collapse, with the attendant danger to life, etc. The mine-manager, Brigham, explained the system which was adopted, by which the sand or gravel was brought several miles to and into the mine, underground, and there dumped in the open spaces which have been left by the excavations made. It is apparent from the testimony given by this witness that the extraction of the minerals from the ground could not be carried on unless the sand or gravel or some other

filling material were brought and taken underground, to be used for filling purposes.

In my view of the interpretation to be placed upon the statutory provision, inasmuch as the operations could not be carried on unless this filling were regularly done, and therefore the extraction of the ore or mineral from the ground would of necessity stop, that portion of the plant, namely, the conveyor system, which provides for this filling, is just as essential to the obtaining of the mineral as is the hoist which brings the mineral to the surface.

I am of opinion, therefore, that for this reason the items in 3(b), as to which the appeal of the township was not abandoned, are not properly assessable, and that the decision of the Railway Board should be affirmed, and the appeal of the township dismissed. The Board based their decision on a judgment of this Court in *Re Ford Motor Co. of Canada Ltd. and Town of Ford City* (1929), 63 O.L.R. 410, affirmed in the Supreme Court of Canada in the same year, *Town of Ford City v. Ford Motor Co. of Canada Ltd.*, [1929] S.C.R. 490. I am inclined to the view that the Board's decision should be supported on that ground also.

Even were the above grounds not sufficient to support the company's contention, there are other obstacles in the way of the township's success, with respect to the assessment of a portion, at least, of the conveyor system, and the same difficulty arises in respect to the electric railway and the electric power-line. All of these are constructed partly over mining lands, which are the property of other persons or companies from whom the Hollinger company has, at the most, a mere licence. According to the evidence upon the record, the mines company, with respect to these portions of its plant is practically in the position of a squatter, having laid its rails or erected its power-line and conveyor system merely with the verbal permission of the owners of the various properties which are traversed. The evidence is not sufficient to shew that they enjoy any easement, but at the highest, a licence only. In so far as these portions of the plant are erected over or upon the property of others, they are not assessable under the statute in respect of the mining lands of this company, and do not form any part thereof. If, on the other hand, they are chattel property, as such they are not assessable.

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In my opinion, the appeal of the township should be dismissed with costs, and the cross-appeal of the mines company allowed, also with costs.

*Order accordingly.*

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## [APPELLATE DIVISION.]

STEVENS v. SKIDMORE.

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June 19.

*Limitation of Actions—Tenants in Common—Evidence.*

The judgment of RANEY, J. (1931), 66 O.L.R. 494, affirmed.

APPEAL by the defendants from the judgment of RANEY, J. (1931), 66 O.L.R. 494.

June 19. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, J.J.A.

*Shirley Denison*, K.C., for the appellants, argued that the plaintiff's claim to an undivided one-half interest in the lands in question was barred by the Limitations Act, R.S.O. 1927, ch. 106, particularly secs. 4, 5(1), 11, and 15: *Allen v. England* (1862), 3 F. & F. 49; *Darby and Bosanquet on Statutes of Limitations*, 2nd ed., p. 352; *Davis v. McKinnon* (1871), 31 U.C.R. 564. The plaintiff's evidence as to the agreement with his brother in 1903 that the brother should pay all the taxes, make all repairs, and do all statute labour, and that the plaintiff should resume possession as co-parcener whenever he liked, was not corroborated as required by the Evidence Act, R.S.O. 1927, ch. 107, sec. 11. The evidence shewed that the plaintiff discontinued possession within the meaning of the Limitations Act, sec. 5(1).

*Gordon Waldron*, K.C., for the plaintiff, respondent, contended that his client had never given up possession and had never intended to do so. The appellants had not proved that the respondent had given up possession. There had never been any exclusion of the plaintiff: *Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273. The tenancy of the appellants had been proved from 1930, and so the statute never began to run against the respondent. There was sufficient "other material evidence" to corroborate the plaintiff's evidence as required by the Evidence Act: *Thompson v. Coulter* (1903), 34 Can. S.C.R. 261. Reference also to *Bayley v. Trusts and Guarantee Co. Ltd.* (1930), 66 O.L.R. 254.

LATCHFORD, C.J. (delivering the judgment of the Court at the close of the argument):—The evidence at the trial fully supported the plaintiff's contention, and the defence did not establish that the plaintiff had been out of possession of the property in question during the ten years next preceding the teste of the writ. The

App. Div. contrary was in fact clearly proved. Accordingly the Statute of  
1931. Limitations had no application.

*Appeal dismissed with costs.*

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WALKER V. SOLLOWAY MILLS & CO.

June 17.

*Evidence—Inspection and Copying by Plaintiff before Trial of Documents of Defendants in Possession of Crown—Criminal Prosecution of Defendants Pending—Order under Rule 350—Dealings between Brokers and Customer—Terms of Order.*

Rule 350 was intended to simplify the procuring of evidence, and to avoid the taking of a witness who is the custodian of documents to a trial, and was not intended to be a means of obtaining discovery from strangers to an action. Under it, information may be incidentally obtained before a trial—but this is only an incidental result of the Rule, and care must be exercised in all applications under it to avoid abuse.

*McCurdy v. Oak Tire and Rubber Co. Ltd.* (1918), 44 O.L.R. 235, approved.

The plaintiff, a customer of the defendants, who formerly carried on business as stockbrokers, asked (a) for an account of moneys paid to the defendants as interest on alleged debit-balances, when in fact there was none; (b) for the repayment of commissions paid to the defendants on the purchase and sale of stocks, when in fact no such purchases and sales had been executed by the defendants; (c) for the return of moneys paid to the defendants for the purchase of stocks, when in fact no such purchases had been made; and (d) for an accounting of all secret profits made by the defendants out of transactions with the plaintiff. The defendants were under criminal indictment, and their trial was proceeding. The Crown had seized certain of their books, records and documents, and these were said to be in the possession for the Crown of a firm of accountants. Upon the application of the plaintiff, the Master made an order, under Rule 350, directing the production, for the purpose of inspection and the making of photostatic copies thereof, of books of account or records and documents in any way relating to the account of the plaintiff with the defendants, upon the ground that these books, records, and documents might be compelled to be produced at the trial of the action. The order was affirmed by McEvoy, J., in *Chambers* (1931), 40 O.W.N. 212:—

*Held*, on appeal to the Appellate Division, that the application should not be treated as one for production and discovery in the ordinary sense of these terms; but Rule 350 was applicable and specially adopted to the exigencies here presented; and it was therefore proper that an order should be made under that Rule, not for discovery, but so that certified copies of these documents might be available as evidence as the trial of this action.

The existing order being too vague and general, its terms were varied in the manner set out below.

AN appeal by the defendants from the order of McEvoy, J., in Chambers (1931), 40 O.W.N. 212, whereby an order of the Master was reversed and production of certain documents was directed under the provisions of Rule 350, they being in the possession of certain agents of the Crown for the Crown.

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June 8. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*R. I. Ferguson*, for the appellants.

*W. J. P. Jenner*, for the plaintiff, respondent.

The arguments of counsel are sufficiently stated in the judgments.

June 17. RIDDELL, J.A.:—This is an appeal by the defendants from the order of Mr. Justice McEvoy, whereby the order of the Master was reversed and production of certain documents was directed under the provisions of Rule 350, they being in the possession of certain agents of the Crown for the Crown.

In view of the very wide range taken in argument, it would seem proper to set out somewhat at length the matters involved in the action, as they appear from the pleadings.

The plaintiff, a printer in Paris, Ont., sues Solloway and Mills, "who formerly carried on business under the name of Solloway Mills & Company," and also their successor, the incorporated company of Solloway Mills & Company Ltd. He alleges that, Solloway and Mills carrying on business as brokers in Toronto, the company was incorporated in 1928, and thereafter the company carried on the business formerly carried on by the two individuals named; that he was a client of the defendants, doing business through them purchasing and selling stocks and securities; that they represented to him that they had carried out his instructions, but that they did not execute his orders, in many cases no purchase having been made; moreover, they converted stocks which they were carrying or affecting to carry on margin for him to their own use, charging him interest as though they were actually carrying the stocks for him; they also wrongfully and illegally charged him with commissions on alleged purchases for him that were not actually made, and they made secret profits out of the transactions in which he was concerned.

Solloway denies that he ever had any dealings with the plaintiff as a broker or that he ever did any business on his behalf; and

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says that, if he did, he carried out the orders given, and did not convert any stock of the plaintiff; and that, in any case, all obligations and liabilities of him, Solloway, to the plaintiff were assumed by the incorporated company with the plaintiff's consent; that he fully accounted for all moneys and securities of the plaintiff to him, and that the action "is barred by delay and laches."

The company puts in a statement of defence which, as amended, denies any dealing with the plaintiff whatever, and says that, if it had any such dealing, every order was properly carried out; that it did not convert any stocks or securities, and made no secret profit. Then, in the alternative, it is alleged that there was an account stated with the plaintiff, which shewed a balance of \$399.80 due by him, which it sets off against the plaintiff's claim; delay and laches are also pleaded. This statement of defence is filed by the solicitors who filed that of Solloway, individually. We are furnished with no statement of defence of Mills. An affidavit on production was made by Solloway on the 21st March, 1931, in which he sets out no documents in his possession, but as having been in his possession but not then:—

"Ledger statement, copies of confirmation, purchase and sale slips, stock registers, clearing sheets and statement of accounts, having reference to the plaintiff's account up to and including the 20th May, 1928."

These, he said, "were delivered by me to Solloway Mills & Company Ltd. (Dominion) on or about the 31st day of May, 1928, and are now in the possession of the Crown, with the exception of the ledger statement and statements of account, which were mailed or delivered to the plaintiff."

An affidavit on production was filed on behalf of the company, setting out a ledger statement in its possession, and as having been in its possession: "copies, confirmations and purchase and sales slips, stock registers, clearing sheets and statements of accounts."

These documents, it is said, "are in the hands of the Crown except statement of account which was sent from time to time to the plaintiff and particularly on or about—"

No objection is taken in any such affidavit to the production of the documents mentioned.

It appears that the papers of the defendant, the company, were taken possession of on behalf of the Crown. The plaintiff moved before the Master under Rule 350; it being recognised that no order

would be made for such production of documents in the possession of the Crown without the consent of the Crown, a consent was obtained from the Attorney-General "to an order being made for the production of the books, records and documents of Solloway Mills & Company Ltd. and of the partnership of Solloway and Mills, for the purpose of inspection and the making of photostatic copies thereof by the plaintiff in this action."

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"The said books are to remain in the custody of Messrs. Edwards Morgan & Company, chartered accountants, or such other person or persons as this Department may from time to time direct, and such inspection or making of photostatic copies to be done at such time or place as the Department may permit."

And on the 24th March the Master made an order "that all books, records and documents of the defendants which in any way relate to the issues in this action now in the custody and control of Edwards Morgan & Co., chartered accountants, acting on behalf of the Crown, be produced, subject to the consent of the Crown, for the purpose of inspection thereof by the plaintiff and the making of certified or photostatic copies of such records, documents and entries in any books which in any way relate to the issues in this action."

There was pending a criminal charge against Solloway and Mills concerning transactions alleged to be similar to those charged in the present case; and the Master, quite properly, ordered a stay of the order for production until after the trial then approaching.

An appeal was taken against the order for production; but it was dismissed by Mr. Justice McEvoy on the 1st May, while an appeal against the stay order was allowed, "without prejudice to the right of the defendants to apply for a stay of the trial of this action until after the trial of the criminal proceedings now pending against the defendants has been heard and disposed of."

An appeal is now taken from the order of Mr. Justice McEvoy, by special leave given by Mr. Justice Garrow, the grounds stated being:—

"(1) The said order is contrary to law.

(2) The Rules of Court do not authorise the making of an order for production of records in the hands of the Crown.

(3) There is no material before the Court to shew that there is any material in the hands of the Crown relevant to the issues in this action.

- App. Div. (4) No issues arise from the pleadings entitling the plaintiff  
1931. to production.
- WALKER (5) The issues in the action ought to be disposed of before the  
v. details of the transactions, if such took place, are gone into.
- SOLLOWAY (6) The order of the Master is nugatory, as by the said order  
MILLS & Co. no one is directed to produce the books.
- Riddell, J.A. (7) The said documents are privileged on the ground that they  
would, if produced, tend to incriminate the defendants, or some of  
them."

All these grounds were exhaustively argued before us; some of them may be shortly disposed of.

Leaving aside (1), which is meaningless, (2) would admittedly be valid but for the consent of the Crown already mentioned, which disposes of the objection. As to (3), the affidavit on production of Solloway mentioned above is that these documents relate "to the matters in question in this action;" (4) is similarly disposed of, even were it more than the merest trifling, which it seems to be; (6) is equally trifling, the documents being in the actual possession of the persons named and the production being ordered—if this were a real objection, it could and would be easily removed by a simple amendment. It is to aid in the determination of the issues in the action, not to amend or frame a pleading as was urged on the argument, that the production is sought, and no court would omit to give such assistance as it lawfully could to determine the facts by all available evidence—this consideration disposes of (5) adversely to the appellants. No. (7) is the only objection that has any semblance of substance.

This objection is based upon affidavits of (a) Seaborn, the secretary of the defendant company, (b) Mr. Ferguson, solicitor for Solloway, and (c) a second of Seaborn. From them it appears that some thirteen charges of theft were laid against Solloway and Mills, arising out of the transactions of their partnership and those of their succeeding companies (two in number); and that the documents now in the possession of the Crown were seized in connection with these charges. All that Mr. Ferguson has to say about their production is as follows:—

"The said defendant (i.e., Solloway) cannot properly defend the criminal charges if he is compelled to produce books, papers and documents while the criminal charge is proceeding, and it is absolutely essential that the said defendant give all his time and atten-

tion to his defence in the criminal case in order to properly defend himself."

Seaborn indeed says: "The production of the books and papers in the possession of the Crown which belong to the defendants may tend to incriminate the defendants;" but he goes on to particularise in reference to the charges made against Solloway and Mills, in connection with which the books were seized by the Crown, and to say as follows:—

"5. Certain criminal charges have been made by the Crown against the defendants Isaac W. C. Solloway and Harvey Mills, and it is in connection with these charges that the books of the company have been seized by the Crown.

"6. The preliminary hearing in connection with such charges is proceeding to-day before the magistrate, and I am advised by the Crown officers and verily believe that if the said defendants are committed for trial the Crown will proceed to trial at the earliest date possible.

"7. I am advised by the solicitors for the defendant companies and the defendant Isaac W. C. Solloway that, if production and inspection of the books and records is ordered, the defendants will be seriously prejudiced and embarrassed in the preparation of the defence in the criminal proceedings.

"8. The defendants desire that all production and discovery be stayed in this action pending the disposition and completion of the criminal proceedings."

It is obvious that the incrimination supposed was in connection with the charges under which the two defendants then lay: the affidavit was sworn on the 13th March, 1931, and the two persons charged were before the jury at the time of the argument of the appeal, and could not then be incriminated by any production of these documents, even if it did not savour of absurdity to suggest that the production to the plaintiff of documents already in the possession of the Crown for the purposes of the criminal prosecution could do any mischief in the way of incriminating them. This is not a ground for refusing the order to produce.

The argument took a very wide range, much of it, in my view, irrelevant; and I do not consider that we are called upon to discuss the object of the Rule, or its range, or the law as to the method of attacking an account stated, etc., which were elaborated upon by counsel. I can find nothing to justify the reversal of the

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App. Div. order appealed from in any or all of the reasons of appeal, and  
1931. would dismiss the appeal with costs to the plaintiff in the cause.

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By consent of the plaintiff the production ordered will be limited to the documents which are relevant and admissible as evidence on the issues in the action.

Riddell, J.A. ORDE, J.A., agreed with RIDDELL, J.A.

MASTEN, J.A.:—Appeal by the defendants from the order of McEvoy, J., dated the 1st May, 1931, dismissing the defendants' appeal from an order of the Master dated the 24th March, 1931.

The plaintiff claims to have been a client or customer of the defendants, who formerly carried on a brokerage business in Toronto, and he claims to have bought and sold stocks through the defendants.

The prayer of his statement of claim is as follows:—

(a) For an account of moneys paid to the defendants as interest on alleged debit balances, when in fact there was no such debit balance;

(b) And for the repayment of commissions paid to the defendants on the purchase and sale of stocks, when in fact no such purchases or sales had been executed by the defendants;

(c) And for the return of moneys paid to the defendants for the purchase of stocks, when in fact no such purchases had been made by the defendants in accordance with the instructions given;

(d) And for an accounting of all secret profits made by the defendants out of the transactions which the plaintiff had with them.

The defendants are under criminal indictment, and their trial is proceeding at present. The Crown has seized certain of their books, records and documents, and these are said to be now in the possession of the firm of Edwards Morgan & Company, accountants, for the Crown.

The plaintiff moved before the Master for an order, pursuant to Rule 350, "directing the production, for the purpose of inspection and the making of photostatic copies thereof, of books of account or records and documents in any way relating to the account of the plaintiff with the defendants I. W. C. Solloway and Harvey Mills, and with Solloway Mills & Company Ltd. (Ontario company), including order slips, (clients') confirmations, clients' ledger account, stock register, brokers' receipts, clearing sheets, ledger

shewing house account, or short position, upon the following grounds, that such books, records and documents, of the said defendants might be compelled to be produced at the trial of the action." The Master made the order asked, and on appeal by the defendants to McEvoy, J., that order was confirmed and the defendants' appeal dismissed. The defendants now appeal to this Court.

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In the Court below, the application was treated elaborately and exclusively as an application for production and discovery in the ordinary and usual sense of these terms; and on the argument before us counsel for the defendants dealt with it in the same way. I am of opinion that this method of treating the application is erroneous. I agree with the view expressed by Middleton, J.A., in *McCurdy v. Oak Tire and Rubber Co. Ltd.* (1918), 44 O.L.R. 235, where he says:—

"I am clear that Rule 350 was intended to simplify the procuring of evidence, and to avoid the taking of a witness who is the custodian of documents to a trial, and was not intended to be a means of obtaining discovery from strangers to an action.

"Incidentally information may be obtained before a trial—e.g., when a banker is compelled at an earlier stage than usual to disclose his customer's accounts—but this is not the main but a subsidiary purpose of the Rule, and care must be exercised in all applications under it to avoid abuse."

Rule 350 seems to me to be peculiarly applicable in the circumstances of the present case, and to be specially adaptable to the exigencies here presented.

When the criminal trial of the defendants now in progress is completed, it is at present entirely uncertain what will become of the books and documents in question. They may be handed over to the defendants, if they are acquitted, and thereupon removed out of the jurisdiction, or, if retained by the Crown, it may become necessary to remove them out of Ontario in connection with criminal prosecutions in other Provinces of Canada. They are alleged to constitute evidence essential to the plaintiff's case, and that allegation seems to be well-founded.

It is therefore proper that an order should be made under Rule 350, not for discovery, but so that certified copies of these documents and papers may be available as evidence at the trial of this action. The circumstance that as a result of such an order the

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plaintiff incidentally secures discovery of these documents does not here occasion any abuse of the defendants' rights. But for the fact that these documents have been seized by the Crown they would, at the present stage of this action, be producible by the defendants in the ordinary and usual course of proceedings.

I think, therefore, that an order should go under Rule 350. But the terms of the existing order appear to me to be somewhat too general and vague, and I think its terms should be varied to read as follows:—

"It is ordered that pursuant to and in accordance with the terms of the consent of the Crown, the documents in the possession of Edwards Morgan & Co., chartered accountants, or in the custody of the clerk of the assize at Toronto and hereinafter specified, be produced to the plaintiff or his solicitor by the said Edwards Morgan & Co. and by the said clerk of assize at Toronto for inspection by the plaintiff or his solicitor or authorised agents, and that the plaintiff may make or cause to be made certified copies (photostatic or otherwise) of the said documents, and that, saving all just exceptions, such certified copies may be used on the trial of this action in lieu of the original documents.

"2. The documents referred to in paragraph 1 are the following: All documents which are relevant and admissible as evidence on the issues in this action with respect to the transactions between the plaintiff and defendants.

"Nothing in this order contained shall prejudice or affect the discretion of the trial Judge with regard to the relevancy of the said documents to the issues tried before him.

"The costs of the inspection hereby authorised and of the making of such certified copies shall be in the discretion of the taxing officer on the final taxation of costs of the action.

"Costs of this appeal to be costs to the plaintiff in the cause."

I only desire to add that, in my opinion, owing to the misconception of the true import of Rule 350, the elaborate discussion in the reasons for the order appealed from, and in the argument before us, is *obiter* and *nihil ad rem*. On that account I have not dealt at length with the reasoning in the judgment appealed from.

LATCHFORD, C.J., and FISHER, J.A., agreed with MASTEN, J.A.

*Order below varied as stated by MASTEN, J.A.*

[ORDE, J.A.]

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*Will—Construction—Effect of Trust Deed—Settlement of Fund—Defective Exercise of Power of Appointment—Shares of Widow and Children—Share of Grandson Dying in Infancy Intestate and Unmarried Passing to his Father under Law of Manitoba—Unlimited Gift of Income Carrying Corpus—"Then Living"—Period of Distribution—Death of Testator—Death of Widow.*

M. died in June, 1891, leaving him surviving his widow, his daughter, who was unmarried, and his son, who was married and had then two living children, one (Mrs. G.) by his first wife and one by his second wife, a boy who was living at the death of M., but who died in April, 1905, an infant under the age of 21 years and unmarried. M.'s widow died in September, 1920, and his son in March, 1929. The son's widow and his daughter Mrs. G., and also M.'s only daughter, still unmarried, were all living at the time when a motion was made for an order determining the true interpretation of M.'s will and also determining whether or not the power of appointment which he possessed over a certain fund was validly exercised by his will. The fund was vested in trustees upon certain trusts for the benefit of M. and his wife during their lives, with a limited power to M. to appoint by deed or will the capital of the fund and the surplus income therefrom over and above the annuity of \$2,000 to his widow, in favour of one or more of his issue then born or to be born in his lifetime or within 21 years after his death, and, in default of appointment, in trust as to such capital and income for his children in equal shares. By his will, M. specifically devised his realty to his executors in trust to allow his wife to occupy the same for life, and after her death to dispose thereof and pay the proceeds to the trustees under his marriage settlement for the benefit of his daughter. The rest of his estate, with the exception of certain specific gifts, was bequeathed to his executors upon trust to convert into money and out of the money pay funeral and testamentary expenses and debts and invest the residue, and as to one moiety thereof and during the life of his daughter and of her mother to pay to the mother the income thereof for the maintenance education and advancement in life of his daughter and with power to the mother to invest or apply the same for her use and benefit as his wife may in the unfettered exercise of her discretion think fit without any liability on the part of the executors to see to the application thereof; and upon the death of his daughter to stand possessed of the moiety and the income thereof for the benefit of his wife; and after her death for the benefit and advantage of the wife and child or children then living of his son in the manner provided as to the disposition of the other moiety—and as to the other moiety in trust to apply the income for the benefit of the wife of his son and for the maintenance education and advancement in life of the said child or children and generally to apply the same for his her or their use and benefit as they in the unfettered exercise of their discretion may think fit, including the right to pay to his son from time to time the income for the purpose aforesaid and as to these several applications without any liability on the part of the executors to see to such applications; and as the said child or children shall become of the age of 21 either to divide and transfer to each child his or her share of the last mentioned moiety or to continue the payment of the income only as they in their unfettered discretion may see fit. The power of appointment

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over the fund was exercised by the will in the following terms: "As to any residue or balance that may from time to time remain in the hands of the trustees . . . arising from the . . . income derived from the moneys or securities . . . thereby settled after payment out of the same to my wife of the annuity of \$2,000. . . . I desire that while my wife and daughter shall both be living from time to time and immediately after such payment shall be made to my wife on account of such annuity one moiety of the said residue or balance shall be paid over to my executors for the benefit . . . of the wife and child or children of my said son in the manner hereinbefore provided with respect to such wife and child or children and the other half to my wife to be expended or invested at her own will and pleasure . . . ; and in case my said daughter shall predecease my wife I desire that during the lifetime of my said wife the whole of the said residue or balance . . . in the hands of the trustees after payment of the said annuity shall be paid to my executors to be applied by them for the benefit . . . of the wife and child or children of my son . . . and that after the decease of my wife the whole of the moneys . . . be applied also for the benefit . . . of the said wife and child or children of my son. . . . In case my wife should predecease my said daughter I desire that the whole of the said moneys . . . be by the said trustees paid over . . . to my executors who shall hold the same in trust to apply and invest . . . and shall during the lifetime of my said daughter apply one moiety of the . . . income thereof for the benefit . . . of my said daughter . . . and shall apply the other moiety for the benefit . . . of the wife and child or children of my said son . . . and upon the death of my said daughter I direct that my executors shall apply the moiety first above mentioned as well for the benefit . . . of the said wife child and children in the manner hereinbefore described as well as the moiety secondly above mentioned:"—

*Held*, that the disposition of the income upon the first moiety of the residue of the testator's own estate must be treated as a gift in the first instance to his daughter during her life; the income is to be paid to her mother, but for the purpose only of the maintenance, education, and advancement in life of the daughter; and where the gift is solely for the benefit of the person to be maintained, it is in substance a gift to that person, and the recipient of the income is merely a trustee or administrator thereof; the gift over to the mother after the daughter's death made it clear that the mother took no beneficial interest in the income during the daughter's lifetime.

In the will there is no express gift of the corpus of the residue; but where there is no express gift of the corpus an unlimited gift of income carries the corpus with it.

*Coward v. Larkman* (1888), 60 L.T.R. 1, and *Re Jones* (1927), 60 O.L.R. 136, followed.

Applying the rule, the gift of the income of the second moiety carried with it the gift of the corpus thereof; and the corpus of the first moiety, subject only to the daughter's life-interest in the income, went in the same way.

As to the exercise by M. of the power of appointment over the fund, the attempt by the will to appoint any share of the fund or of its income in favour of the son's wife was invalid, she not being issue of the testator and therefore a stranger to the power. This defective exercise of the power, coupled with the appointment in favour of the child or children of his son, they taking as a class, had given rise to certain questions, as to which it was *held*:—

(1) and (2) That there was an immediate vested gift under the appointment in favour of such children of the son as were living at the

testator's death; there being two children in the class, the appointment, so far as their shares, were concerned, was valid because there was no uncertainty as to their shares, and there was no infringement of the power by any enlargement of the class beyond the limitations proposed by the trust deed; and the appointment as to one-third in favour of each of the children was valid, notwithstanding the invalidity of the appointment to the son's wife.

- (3) That the appointment in favour of the son's children carried with it the corpus as well as the income.
- (4) It was admitted that the daughter could not take advantage of the gift over as to the share in the trust fund which would, if valid, have gone to the son's wife, without bringing her share, even though it consisted of income only into hotchpot under the terms of the trust deed; and that both she and the son, who would likewise benefit under the gift over upon default of appointment as to that share which would otherwise have gone to his wife, were put to their election between the gifts to them out of the testator's own estate and the augmented benefits accruing to them by virtue of the invalid appointment.

The testator dealt with his estate in two moieties. The income from one moiety was given to his daughter for life. The widow died before the daughter, but the gift to the widow was followed by the words "and after her death for the benefit and advantage of the wife and child or children then living of my said son." He evidently contemplated that the income from this moiety should go first to his daughter, then to his widow, and then to his son's wife and child or children:—

*Held*, having regard to the context, that the words "then living" referred expressly to the death of the widow, and that meaning was not affected by the fact that the widow in fact predeceased the daughter and that the period of actual enjoyment of the gift was, so far as the income was concerned, postponed until the daughter's death; the intervention of the daughter's life-interest could not affect the precise point of time which the language of the will fixed for determining the members of the class entitled in remainder to the benefit of the first moiety, notwithstanding that the life-estate of the daughter had not then fallen in; in this view, as the son's son was not living at the death of the testator's widow in 1920, he could not be a member of the class entitled to any share in the first moiety, which consequently went, subject to the daughter's life-interest, to the son's widow and daughter in equal shares.

As to the other moiety, the gift in favour of the son's children did not depend upon their surviving the testator's widow, but went to those children who survived the testator; consequently the second moiety, both capital and income, vested at the testator's death in his son's wife and two children in equal shares; and the son's one-third share would form part of his estate at his death, and would pass to his only heir and next of kin, according to the law of Manitoba, where the boy had resided from the date of his birth to his death with his father, viz. that father.

As regards the fund, the children of the son as a class were those living at the death of the testator; and the fund, by virtue of the words of appointment, would be distributed among the son's wife and two children living at M.'s death in equal shares; but, the appointment in favour of the son's wife being invalid, a third of it fell to be dealt with as in default of appointment; the remaining two-thirds went equally to the son's two children, subject only to the prior life-interest of the testator's widow and daughter; and the son's one-third share, as part of his estate, passed upon his death to his father.

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APPLICATION by the Royal Trust Company, executor and trustee under the will of the Right Honourable Sir John Alexander Macdonald, deceased, upon originating notice, for an order determining the true interpretation of his will and also determining whether or not the power of appointment which he possessed over a certain fund was validly exercised by his will.

The application was heard at a sittings of the Weekly Court at Ottawa by ORDE, J.A.

*A. C. T. Lewis*, K.C., for the Royal Trust Company, executor and trustee of the estate of Sir John A. Macdonald, and also for the Royal Trust Company as executor of Susan Agnes the Baroness Macdonald of Earncliffe, and also for the Royal Trust Company as trustee under a certain trust deed hereinafter mentioned.

*M. G. Powell*, K.C., for the Hon. Mary Macdonald.

*Sir Charles Stewart Tupper*, Bart., K.C. (of the Manitoba Bar), and *H. L. Robson*, for Isabella Mary Gainsford.

*A. W. Greene*, K.C., for Dame Agnes Gertrude Macdonald.

*E. Percival Brown*, K.C., for Theodora Van Eeghen.

*J. F. Smellie*, K.C., for the Official Guardian representing the infant children of Isabella Mary Gainsford.

The Royal Trust Company, as executor of the will of the late the Honourable Sir Hugh John Macdonald, filed a written consent to be bound by the proceedings as if represented.

April 21. ORDE, J.A.:—This is an originating motion for the interpretation of the will of the late the Right Honourable Sir John Alexander Macdonald, P.C., G.C.B., who at the time of his death was Prime Minister of Canada. The questions raised involve not only the dispositions made by the testator of his own estate, but also whether or not the power of appointment which he possessed over a certain fund was validly exercised.

When the motion was argued, neither the estate of the testator's widow, who was afterwards created the Baroness Macdonald of Earncliffe, nor the estate of his surviving son, the late the Honourable Sir Hugh John Macdonald, was represented. Upon it appearing during the argument that it was contended that in the events that had happened the testator had died intestate as to part of his estate, I directed that the executors of the wills of the Baroness Macdonald and of Sir Hugh Macdonald should be notified so that they might be represented if they so desired. It so happened that

the executor in both cases was the Royal Trust Company, which is also the executor of the testator.

It has taken some time to secure the due representation of the two estates, but this has now been done, and a written argument on behalf of the trust company as executor of the Baroness Macdonald has been put in. Counsel on behalf of Theodora Van Eeghen, who is a beneficiary under the will of the Baroness Macdonald, has also submitted an argument. The trust company, as executor of the will of Sir Hugh John Macdonald, has filed a written consent to be bound by the proceedings as if represented.

Sir John Alexander Macdonald died on the 6th June, 1891, domiciled in Ontario. Probate of his will, which was dated the 4th September, 1890, was granted by the Surrogate Court of the County of Carleton on the 29th June, 1891, to his executors, the Honourable Edgar Dewdney, Frederick White, Joseph (afterwards Sir Joseph) Pope, and Hugh John (afterwards Sir Hugh John) Macdonald. By an order made by the late Chancellor Boyd on the 31st January, 1914, the Royal Trust Company was appointed executor and trustee of the estate in substitution for the four executors named in the will.

At his death Sir John left surviving him his widow, Susan Agnes Macdonald, afterwards the Baroness Macdonald of Earnscliffe, his daughter Mary, now the Honourable Mary Macdonald, and his son Hugh John Macdonald, afterwards the Honourable Sir Hugh John Macdonald, who was then married to Agnes Gertrude Macdonald. Sir Hugh John then had one living child, Isabella Mary Macdonald, now Mrs. Gainsford\*; no other children were afterwards born to him.

The Baroness Macdonald of Earnscliffe died on the 5th September, 1920, and Sir Hugh John Macdonald died on the 29th March, 1929. Sir Hugh John's widow, Dame Agnes Gertrude Macdonald, and his only surviving child, Mrs. Gainsford, are still living, as is also the Honourable Mary Macdonald, the testator's only daughter.

The motion has two distinct branches. One involves the interpretation of those provisions of the will of the testator which deal with his own estate. The other raises certain questions as to the

\* This statement was based upon an error in the material filed. There were two children of Hugh John's living at the testator's death. See supplementary judgment, *infra*.

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Orde, J.A. validity of the exercise by the testator of the power of appointment contained in a certain trust deed. It will be simpler to set out the terms of the trust deed first.

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On the 27th March, 1872, a deed of trust was executed whereby a fund, commonly referred to as the "testimonial fund," was vested in three trustees, the late the Honourable George W. Allan, the late Sir Casimir Gzowski, and the late Colonel Hewitt Pernard (Sir John's brother-in-law), upon certain trusts for the benefit of Sir John and Lady Macdonald during their lives, with a limited power to Sir John to appoint by deed or will the capital of the fund and the surplus income therefrom over and above the annuity to his widow, in favour of his issue, and, in default of appointment, in trust as to such capital and surplus income for his children in equal shares. By divers mesne appointments, the trusteeship of the testimonial fund became ultimately vested in the Royal Trust Company, which is now the trustee. Those portions of the trusts upon which the testimonial fund is held which are relevant upon this motion are as follows:—

"And after the death of the said Sir John Alexander Macdonald and subject to the discretionary trust or power given to the said trustees or trustee over the income of the said trust premises as aforesaid and to every or any exercise of such discretionary powers or trusts shall stand possessed of the said trust moneys funds and securities and the dividends interest and income thereof upon trust from and out of the said dividends interest and income from time to time during the life of Susan Agnes Macdonald the wife of the said Sir John Alexander Macdonald to pay to her the yearly sum of two thousand dollars by equal half-yearly portions on the first day of January and of July in each and every year the first half-yearly payment to become due and be paid on the first day of January or July which shall first succeed the death of the said Sir John Alexander Macdonald and to be a proportionate part of such annuity in respect of the portion of any half-year current at the time of such death as aforesaid. And as to the said trust moneys funds and securities and the dividends interest and income thereof subject to the payment from the same dividends interest and income of the said annuity of two thousand dollars during its continuance the said trustees or trustee shall hold the same respectively upon trust for such one or more exclusively of the other or others of the issue of the said Sir John Alexander Macdonald by

his former or present or any future wife now born or to be born in his lifetime or within twenty-one years after his death at such age or time or respective ages or times if more than one in such shares and with such future and executory or other trusts for the benefit of his said issue or some or one of them and with such provisions for their respective maintenance education or advancement at the discretion of the trustees or trustee for the time being or of any other person or persons as the said Sir John Alexander Macdonald shall either before or after the failure or determination of the trust hereinbefore declared in favour of the said Sir John Alexander Macdonald in his lifetime as aforesaid by any deed or deeds or writing or writings sealed and delivered or by his last will or any codicil duly executed in the presence of and attested by one credible witness at the least with or without power of revocation and new appointment appoint. And in default of any such appointment and so far as no such appointment shall extend in trust for all the children or any the child of the said Sir John Alexander Macdonald by his former or present or any future wife who being a son has attained or shall attain the age of twenty-one years or being a daughter shall attain that age or marry under that age and if more than one in equal shares.

“Provided always that no child who or whose issue shall take any part of the said trust premises under any appointment under any power aforesaid shall in default of appointment to the contrary have or be entitled to any shares in any part of the non-appointed part of the said trust premises without bringing the share appointed to him or her or his or her issue into hotchpot and accounting for the same accordingly.”

By his will Sir John, after appointing his executors, specifically devised his realty in Ottawa to his executors in trust to allow his wife to occupy the same for life, and after her death to dispose thereof and pay the proceeds to the trustees under his marriage settlement for the benefit of his daughter Mary. The rest of his estate, except as to certain specific gifts of life insurance, of certain articles of personalty, and of the shares in certain companies, was bequeathed to his executors upon certain trusts in the following terms:—

“I give and bequeath unto my said executors all my personal estate and property not hereby otherwise disposed of upon trust to sell call in and convert into money the same or such part thereof

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1931. postpone such sale calling in or conversion thereof or of any part  
thereof for so long as they shall think fit, and shall out of the  
RE money produced by such sale calling in or conversion pay my  
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shall invest the residue in some one or more of the modes of investment hereinafter authorised in manner following that is to say. As to one moiety thereof and during the life of my daughter and of her mother to pay to such mother my wife the interest dividends & income thereof for the maintenance education and advancement in life of my said daughter and with power to my wife to invest or apply the same for her use and benefit as she my said wife may in the unfettered exercise of her discretion may (*sic*) think fit without any liability on the part of my executors to see to the application thereof; and upon the death of my said daughter to stand possessed of the said moiety and the interest dividends and income thereof for the benefit of my said wife; and after her death for the benefit and advantage of the wife and child or children then living of my said son in the manner hereinafter provided as to the disposition of the other moiety of my personal property—and as to the said other moiety in trust to apply the interest dividends and income thereof for the benefit of the wife of my said son & for the maintenance education and advancement in life of the said child or children & generally to apply the same for his her or their use and benefit as they in the unfettered exercise of their discretion may think fit, including the right to pay to my said son from time to time the said interest dividends & income for the purpose aforesaid and as to these several applications without any liability on the part of my executors to see to such applications; And as the said child or children shall become of the age of twenty-one years, either to divide and transfer to each child his or her share of the last mentioned moiety or to continue the payment of such dividends interest & income only, as they in their unfettered discretion may see fit and I would suggest the expediency before any daughter of my son is married of my executors causing an antenuptial marriage settlement to be made on such conditions and with such provisions as my executors shall see fit.”

The power of appointment over the testimonial fund was exercised by the will in the following terms:—

“As the personal welfare of my wife is already provided for

by my marriage settlement and by the testimonial so kindly and thoughtfully presented by a number of my personal and political friends and settled by deed of trust bearing date the 27th day of March 1872 I desire that the benefits she may take under my will shall be accepted by her in full satisfaction of her claim to dower out of any real estate of which I now am or shall hereafter be seized. As to any residue or balance that may from time to time remain in the hands of the trustees of the said last mentioned trust, and arising from the interest dividends or income derived from the moneys or securities for money thereby settled after payment out of the same to my wife of the annuity of two thousand dollars by said trust deed provided to be paid I desire that while my wife and daughter shall both be living from time to time and immediately after such payment shall be made to my wife on account of such annuity one moiety of the said residue or balance remaining in the hands of the said trustees shall be paid over to my executors for the benefit maintenance and advancement of the wife and child or children of my said son in the manner hereinbefore provided with respect to such wife and child or children and the other half to my wife to be expended or invested at her own will and pleasure knowing well that in expending or investing the same she will have due regard to the interests of my said daughter and in case my said daughter shall predecease my wife I desire that during the lifetime of my said wife the whole of the said residue or balance from time to time remaining in the hands of the trustees after payment of the said annuity shall be paid to my executors to be applied by them for the benefit maintenance and advancement of the wife and child or children of my son in manner hereinbefore described and that after the decease of my wife the whole of the moneys, funds and securities, the proceeds of the said testimonial, be applied also for the benefit, maintenance and advancement of the said wife and child or children of my son in the manner hereinbefore described. In case my wife should predecease my said daughter I desire that the whole of the said moneys funds and securities proceeds as aforesaid be by the said trustees be (*sic*) paid over transferred and assigned to my executors who shall hold the same in trust to apply and invest the same in some one or more of the modes of investment hereinafter authorised and shall during the lifetime of my said daughter apply one moiety of the interest dividends and income thereof for the benefit and advantage of my said daughter in the same manner

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1931. is hereinbefore provided with respect to other properties settled  
RE for her advantage and shall apply the other moiety for the benefit  
MACDONALD. maintenance and advancement of the wife and child or children  
of my said son in the manner hereinbefore described and upon the  
death of my said daughter I direct that my executors shall apply  
the moiety first above mentioned as well, for the benefit mainten-  
ance and advancement of the said wife child and children in the  
manner hereinbefore described as well as the moiety secondly above  
mentioned.”

Dealing first with the testator's estate, the questions raised by  
this motion are as follows:—

It is argued on behalf of Dame Agnes Gertrude Macdonald  
and of Mrs. Gainsford that any interest that the testator's daugh-  
ter, the Hon. Mary Macdonald, had in the income from the moiety  
of the residue, which by the will is to be paid to her mother for  
her maintenance, education and advancement in life, ceased upon  
the death of her mother, the Baroness Macdonald, and that there-  
after the whole of such moiety became vested in Dame Agnes Ger-  
trude Macdonald and Mrs. Gainsford as the wife and only child  
respectively of the testator's son Hugh John Macdonald, as tenants  
in common.

On behalf of the Hon. Mary Macdonald it is argued that the  
gift of the income upon the moiety of the residue was intended  
for her benefit and that she is entitled to it during her lifetime.

On behalf of the estate of the Baroness Macdonald and also  
of the Hon. Mary Macdonald it is argued that the testator disposed  
only of the income of the second moiety during the lives of the  
donees and that there is an intestacy as to the corpus thereof, and  
that consequently there is likewise an intestacy as to the corpus  
of the first moiety. If sound, this contention would mean that at  
the death of the testator there was a vested interest in the corpus  
in his widow, the Baroness Macdonald, and his two children, Hugh  
John Macdonald and Mary Macdonald, subject only to the life-  
interest of the respective donees thereof in the income.

As to the first of these points, while the intention of the test-  
ator might have been more clearly expressed, I find it impossible  
to treat the disposition of the income upon the first moiety of the  
residue otherwise than as a gift in the first instance to his daughter  
during her life. While the income is to be paid to her mother, it  
is clearly for one purpose only, “the maintenance education and

advancement in life" of the daughter. Gifts of this character often create difficulty. If the gift is clearly to the parent, and the maintenance of children is merely the motive of the gift, the parent takes absolutely. Sometimes such a gift is for the maintenance of both parent and children, as was the case in *Singer v. Singer* (1916), 52 Can. S.C.R. 447. But where the gift is solely for the benefit of the person to be maintained, it is in substance a gift to that person, and the recipient of the income is merely a trustee or administrator thereof. I need not refer to the authorities. They are collected in Theobald on Wills, 8th ed., pp. 554-556.

There is no room here for the suggestion that the maintenance of the daughter is merely the motive for a gift to the mother. The gift is for the purpose of maintaining the daughter and no other. There is nothing to indicate that the mother was to derive any benefit whatever from the gift, and I think that, while the executors were free from liability to see to the application thereof, they could nevertheless have enforced its proper application, just as the daughter herself, or some person on her behalf, if she were still an infant, might have done. This would be my view even if there were no gift over to the mother upon the daughter's death, but that provision makes it quite clear, in my judgment, that the mother took no beneficial interest in the income during her daughter's lifetime and that she was consequently merely a trustee thereof for the daughter's benefit.

Notwithstanding that, it is urged that the direction to pay the income to the mother "during the life of my daughter and of her mother" would be effective only so long as the mother lived, and that the language used by the testator cannot be construed as intending to continue the payment of the income for the daughter's benefit after her mother's death, and that this construction is strengthened by the gift over upon the mother's death.

Had the gift of income been expressed to be for the benefit of the mother and daughter during their natural lives, then it is clear on authority that such a gift would have continued the income to the survivor: *Moffatt v. Burnie* (1853), 18 Beav. 211; *Neighbour v. Thurlow* (1860), 28 Beav. 33; *Alder v. Lawless* (1863), 32 Beav. 72. *A fortiori*, where there is a gift for the sole benefit of one person embraced in a direction to pay the income to another person during the lives of both, the death of the recipient who is merely a trustee cannot, in my opinion, affect the

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Orde, J.A. manifest intention that the person to be benefited is to enjoy the benefit for life.

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MACDONALD. That intention, as I have already said, is apparent from the gift over to the mother for her life upon the daughter's death. Until the daughter's death, the mother acquired no beneficial interest in the income whatever.

It is elementary that the death of one who is merely a trustee for another' benefit cannot affect the rights of the *cestui que trust*, as the Court never allows a beneficial gift to be defeated for want of a trustee.

Then has the testator effectively disposed of the corpus of his estate, or has he died intestate as to it? It is odd that nowhere is there any express gift of the corpus of the residue, but the authorities are quite clear that where there is no express gift of the corpus an unlimited gift of income will carry the corpus with it. "The rule of construction by which a general and unlimited gift of the income of real or personal estate is held to carry an absolute interest in the corpus is established beyond dispute:" Lord Watson in *Coward v. Larkman* (1888), 60 L.T.R. 1, at p. 3; *Re Jones* (1927), 60 O.L.R. 136.

The difficulty which many people seem to have in understanding this rule is based upon the conception that a gift of income must cease at the death of the donee. But there is no legal or logical justification for this idea. When a testator makes a gift of income unlimited as to time and with no gift over upon the death of the donee, he has in reality given the income to the donee in perpetuity, that is, for ever. That being the case, it is not from a mere desire to enlarge the estate of the donee because of the absence of a gift over, or to avoid an intestacy, that the Courts have so construed unlimited gifts of income, but because the gifts are unlimited. Therefore, an unlimited gift of income, by which is meant a gift not subject to any limitations and so not limited to the life of the donee or by any other period of time, must of necessity carry the corpus. If one is to enjoy the income for ever, one really owns the corpus. This is emphatically expressed in the language of Lord Halsbury in the *Coward* case, *supra*, at p. 2: "The giving of the fruit in an unqualified and absolute manner is a perpetual gift of the tree. It seems to me a pure matter of language; that if you give income of real or personal estate, and the gift of income is absolute and unlimited, it is impossible to doubt that the corpus must be included in the gift."

The gift here is, I think, within that rule. It does not apply, of course, to the gift of income upon the first moiety, both because it is expressly limited for life and because there is an explicit gift over of the income to the beneficiaries of the second moiety upon the termination of the life-interests of the testator's widow and daughter. But, subject to those life-interests, the income upon the first moiety goes to those who benefit from the income of the second moiety, namely, the wife and children of the testator's son. There is no gift over of that income upon the death of such wife or children and no gift of the corpus. I find nothing in the clause to make the rule I have just mentioned inapplicable. On the contrary, the direction to divide and transfer to each child of the testator's son "his or her share of the last mentioned moiety," distinctly points to the intention that the beneficiaries of the income were to receive the corpus. Applying the rule, I am of the opinion that the gift of the income of the second moiety carried with it the gift of the corpus thereof; and it follows that the corpus of the first moiety, subject only to the Hon. Mary Macdonald's life-interest in the income, goes in the same way.

Lest it may seem that I have overlooked it, I must mention the argument made on behalf of Dame Agnes Gertrude Macdonald and Mrs. Gainsford, that, in considering whether or not the Hon. Mary Macdonald's interest in the income terminated upon her mother's death, regard ought to be had to the augmented benefits which thereupon accrued to her, not only under the will, but by virtue of the provisions of her parents' marriage settlement. Assuming it to be the case that the effect of her mother's death was to increase the benefits already enjoyed by the testator's daughter, I find it difficult to deduce from that fact an intention that the income from the moiety of the residue theretofore enjoyed by her should cease in order in some way to reduce the consequent augmentation of her income. I should have thought that any inference would have been the other way. There is surely nothing unusual or anomalous in the fact that the benefits flowing to children from their father's estate are enhanced when they are no longer subject to the provisions in their mother's favour. It happens every day. I do not think any such consideration as that suggested can have any bearing upon the construction of the clause embodying the gift of income to the testator's daughter.

I turn now to the questions raised as to the exercise by the

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testator of the power of appointment over the testimonial fund. By the terms of the trust deed, Sir John was given the power to appoint, by deed or will, the whole of the fund, both capital and income, subject only to the annuity of \$2,000 to his widow during her lifetime, in favour of one or more of his issue then born "or to be born in his lifetime or within 21 years after his death."

It is of course quite plain, and was admitted, that the attempt by the will to appoint any share of the fund or of its income in favour of the wife of the testator's son was invalid, she not being issue of the testator and therefore a stranger to the power.

This defective exercise of the power, coupled with the appointment in favour of the "child or children" of his son Hugh John, the "child or children" taking as a class, has given rise to certain questions which are not, at first blush, easy of solution. These questions shortly are:—

1. Does the defective appointment in favour of Hugh John's wife also invalidate the appointment in favour of his child or children?

2. The appointment being silent as to whether or not any children who might be born to Hugh John after the testator's death were to be included, is the appointment invalid because it might include children born to Hugh John after 21 years from the testator's death, who would not be within the power, or is it limited, upon the true construction of the language of the appointment, to such of Hugh John's children as might be living at the testator's death?

3. Is the appointment limited to the income only, leaving the capital of the trust fund to go under the terms of the trust as upon default of appointment?

4. And there is a question as to those who might benefit by any defective execution of the power being bound to elect between any benefit so derived and the benefits derived under the will from the testator's estate.

I have examined and carefully considered the authorities to which counsel have referred in their arguments as well as many others. I do not intend to review them all.

If in the present case the appointment in favour of Hugh John's "child or children" had been so worded as to make it clear that the words "child or children" were intended to comprise all such children as might be born to Hugh John during his lifetime,

or (in order to keep the appointment within the limits of the power) to such children as might be so born within 21 years after the testator's death, then I think the law would invalidate the gift to the children because, as the gift to Hugh John's wife would be immediate, that is, would, if effective at all, take effect as of the testator's death, it would be impossible to sever the valid appointment from the invalid, because the respective shares of the wife and the children could not then be determined.

But, while the appointment to Hugh John's children is clearly to them as a class, the question has to be answered as to when the class is to be ascertained. The rule is firmly established that a gift to the children of A. means, *primâ facie*, the children in existence at the testator's death, provided there are such children then in existence, and that it does not in such cases include children born to A. after the testator's death: Hawkins on Wills, 3rd ed., p. 86; *Viner v. Francis* (1789), 2 Cox Eq. 190; *Mann v. Thompson* (1854), Kay 638; and the rule applies to gifts by way of appointment: *Harvey v. Stracey* (1852), 1 Drew. 73.

This rule gives way, however, to another, that where the gift is not immediate, so as not to require a determinate share to be distributed to any members of the class until some later date, as, for example, when the gift is to a class of children in remainder, subject to a life-estate, then children born during the life-tenancy are admitted: Hawkins, p. 91.

Here the appointment is to "the child or children" of Hugh John. There is no qualification or extension of those words, and it is clear that unless there is something else in the appointment which affects the nature of the estate they are to get, or which postpones its distribution among them in such a way as to indicate that the class is not to be fixed as at the testator's death, the rule first stated must apply, and the class would be limited to those of Hugh John's children living at the testator's death.

Now, while it is true that the appointment in favour of Hugh John's wife and children might not become wholly distributable, so far as the enjoyment of the benefits conferred were concerned, until after the deaths of Sir John's widow and of his daughter Mary, if they should survive him, yet nevertheless there were certain immediate benefits from the appointment to which Hugh John's wife and children would be entitled at the testator's death. That, in my opinion, is enough to indicate that there was no in-

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Orde, J.A.   tention to be deduced from the terms of the appointment that the  
1931.       class comprising Hugh John's children as it existed at the testa-  
RE       tor's death was to be enlarged by the admission of any children  
MACDONALD. who might be afterwards born to Hugh John. And, if the class  
is once so ascertained, there is nothing in the language of the ap-  
pointment to justify the suggestion that, as to the augmentations  
which would accrue to the gift upon the deaths of the Baroness  
Macdonald and of the testator's daughter, the class might com-  
prise other children than those living at the testator's death. The  
whole tenor of the appointment indicates that there was to be but  
one class of children, not two, and, as that class must, to make the  
immediate gift effective, be determined as at the testator's death,  
then it must be so determined for all the purposes of the appoint-  
ment.

There was, therefore, in my judgment, an immediate vested  
gift under the appointment in favour of such children of Hugh  
John's as were living at the testator's death. There was, in fact,  
only one, namely, Mrs. Gainsford.

There could not, therefore, be any uncertainty at the testa-  
tor's death as to the composition of the class of children who were  
the objects of the appointment, and consequently no difficulty in  
determining the respective shares to which the objects of the ap-  
pointment would be entitled. There being but one child in the  
class, the subject-matter of the appointment would fall to be  
divided between that child and Hugh John's wife in equal shares,  
and the appointment as to one-half in favour of Mrs. Gainsford  
would therefore be valid, notwithstanding the invalidity of the  
appointment to Hugh John's wife of the other half.

This disposes of the first two questions on this branch of the  
motion. The children of Hugh John as a class being determined  
as at the testator's death, the appointment so far as Mrs. Gains-  
ford is concerned is valid, because there was no uncertainty at  
the testator's death as to her share, and there was no infringe-  
ment of the power by any enlargement of the class beyond the  
limitations imposed by the trust deed.

As to the third question, the appointment makes no express  
mention of the capital of the fund, and there is good ground for  
the argument advanced by counsel for the Hon. Mary Macdonald  
that the appointment purports to dispose of the income of the fund  
only. But it is to be observed that, except as to the express limi-

tation of Mary's income for her life, the appointment in favour of Hugh John's wife and children, even if treated as a gift of income only, so far as the language of the gift is concerned, is nevertheless an unlimited gift of income. As such, in the absence of a gift over upon the death of the appointees, it must be construed as an appointment of the corpus as well, upon precisely the same principle as that already applied to the gifts of the testator's own estate, and as exemplified in the *Coward* case above mentioned. There can be no distinction as a matter of interpretation between a direct gift and a gift by way of appointment.

It is argued, however, that, there being a gift over by the terms of the trust deed upon default of appointment, and there being no express appointment of the corpus, the gift over as to the corpus must take effect. This argument treats the matter as if the failure to mention the corpus was a failure to appoint it and as if the extension of a gift of income so as to include the corpus was by implication. The ruling that an unlimited gift of income is also a gift of the corpus unless there is something in the language of the gift to restrict that meaning is, as has already been pointed out, not based upon the absence of a gift over, but is really a mere matter of interpretation of the language of the testator. It is not a question of implication at all. When there is a failure to appoint, and the instrument creating the power contains an express gift in default of appointment, then, as the cases cited in argument declare, the Court will not resort to any theory of an implied gift in the appointment itself merely to defeat the gift over. But this is an entirely different thing from cutting down the comprehensiveness which the ordinary rules of interpretation give to the language of the testator merely because there is a gift over. The Courts say that an unlimited gift of income is a gift of the corpus because that is what those words mean. If there is something in the language to indicate that the words do not mean that, then their interpretation must be restricted accordingly. The language of the gift furnishes its own dictionary.

In my opinion, the appointment in favour of Mrs. Gainsford carried with it the corpus as well as the income in its subject-matter.

As to the fourth question, it is admitted that the Hon. Mary Macdonald cannot take advantage of the gift over as to the share in the trust fund which would, if valid, have gone to Sir Hugh

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Orde, J.A. John's wife, without bringing her share, even though it consisted  
1931. of income only, into hotchpot under the terms of the trust deed.  
RE And it is likewise admitted that both she, and also Hugh John,  
MACDONALD. who would likewise benefit under the gift over upon default of  
appointment as to that share which would otherwise have gone to  
his wife, were put to their election between the gifts to them out of  
the testator's own estate and the augmented benefits accruing to  
them by virtue of the invalid appointment.

I think that the foregoing fully answers all the questions raised upon the motion before me. If the parties have any difficulty in settling the terms of the order it may be submitted to me. The costs of all parties should be paid out of the testator's estate, those of his executors and trustees as between solicitor and client. If the parties desire it and can give me some idea as to what they ought to be, I shall fix their costs in the order.

June 23. ORDE, J.A.:—By some oversight upon the part of those interested in this motion, the material before me indicated and I was given to understand by counsel that the only child of Sir Hugh John Macdonald living at the death of the testator on the 6th June, 1891, was Mrs. Gainsford.

It now appears that Sir Hugh John had a son then living, John Alexander Macdonald, who died on the 26th April, 1905, an infant under the age of 21 years and unmarried. He had resided from the date of his birth until his death with his father in Winnipeg. These facts have all been duly established by affidavit and by admissions, and it is also further established that, by the law of Manitoba as it stood on the date of his death, an infant was incapable of making a valid will and that the property both real and personal of one dying intestate and leaving no widow or children or lineal descendant of any child went to his father.

I have now had the advantage of further written arguments from counsel upon the questions arising from the further facts just stated.

The fact that at Sir John's death his son Hugh John had two children then living, instead of one as I had understood, in no way affects the reasoning of my judgment. It does, however, affect the distribution both of the estate and of the appointed fund.

As to the estate, it raises a question which I was not called upon to consider before. It will be observed that, as to his estate, the testator dealt with it in two moieties or halves. The income

from one moiety is given to his daughter Mary for life, and upon the death of the daughter to the testator's widow for life. The widow died before the daughter, but the gift to the widow is followed by these words "and after her death for the benefit and advantage of the wife and child or children then living of my said son." What is the effect of the words "then living" upon the distribution of the income and with it, according to my ruling, of the capital of the first moiety? The testator evidently contemplated that the income of this moiety should first go to his daughter, then to his widow, and then to his son's wife and child or children. This contemplated sequence of events did not take place, because his widow predeceased his daughter. Is the gift to the son's children to depend upon their surviving both the widow and the daughter? That there is a difficulty here is apparent. But it is clear that, having regard to the context, the words "then living" refer expressly to the death of the widow, and in my judgment that meaning is not affected by the fact that the widow in fact predeceased the daughter and that the period of actual enjoyment of the gift is, so far as the income is concerned, postponed until the daughter's death. I think that the intervention of the daughter's life-interest cannot affect the precise point of time which the language of the will fixes for determining the members of the class entitled by way of remainder to the benefit of the first moiety of the estate, notwithstanding that in the events that have happened the life-estate of the daughter had not then fallen in. If this view is correct, then, as Sir Hugh John's son was not living at the death of the Baroness Macdonald—she died in 1920—he could not be a member of the class entitled to any share in the first moiety of the estate, which consequently goes, subject to the Hon. Mary Macdonald's life-interest, to Sir Hugh John's widow and Mrs. Gainsford in equal shares.

As to the other moiety of the estate, I am of the opinion that the gift in favour of Hugh John's children did not depend upon their surviving the testator's widow but went to those children who survived the testator. It is argued that the gift being to "the said child or children" the class must be ascertained in the same way as in the case of the first moiety and that only those who might survive the testator's widow would be entitled. If the question depended upon the bare words "the said child or children," there would be much force in this contention, but it is clear from

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 1931. be enjoyed immediately after his death. And there is nothing to  
 RE indicate that once the benefits are to commence they are subject  
 MACDONALD. to any divesting because of the failure of any child to survive the  
 widow. The power to divide and transfer to each child his or her  
 share at 21 is a further indication of an intention that the gift of  
 the second moiety was to take effect at the testator's death. Con-  
 sequently the second moiety of the estate, both capital and in-  
 come, vested at the testator's death in Hugh John's wife and his  
 two children in equal one-third shares. The son's share would there-  
 fore form part of his estate at his death and would pass to his  
 only heir and next of kin, according to the law of Manitoba, that  
 is, to his father, Sir Hugh John.

In the case of the testimonial fund, as I have already held, the  
 children of Hugh John as a class were those living at the death  
 of the testator. There is no distinction between the two moieties  
 of the fund in this respect. Consequently the fund, by virtue of  
 the words of the appointment, would be distributed among Hugh  
 John's wife and his two children living at Sir John's death in  
 equal one-third shares. The appointment in favour of Hugh  
 John's wife being invalid, that third of the fund falls to be dealt  
 with as in default of appointment. The remaining two-thirds  
 went equally to Hugh John's son and daughter, that is, each ac-  
 quired a vested interest in one-third of the whole fund, both capi-  
 tal and income, subject only to the prior life-interests of the test-  
 ator's widow and daughter. The son's one-third share, as part of  
 his estate, passed upon his death to his father according to the  
 laws of Manitoba.

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KUPFERSCHMIDT V. AMMONEIT AND RUSSWURM.

June 23. *Promissory Note—Joint Maker Sued as Endorser or Surety—Liability  
 as Endorser, though Signature on Face of Note—Defences of Non-  
 presentation for Payment and Non-receipt of Notice of Dishonour  
 —Bills of Exchange Act, secs. 96, 131, 184, 186—Accommodation  
 Co-maker Entitled to Notice of Dishonour — Extension of Time  
 after Maturity—Release of Surety by Acceptance of Interest in  
 Advance.*

The plaintiff sued the two defendants on a promissory note, dated the  
 1st December, 1926, whereby they promised to pay the plaintiff or  
 order \$1,000 with interest at 5 per cent., one year after date. The

defendant R. signed the note as accommodation to the defendant A.; and the plaintiff knew this. A. did not defend the action. When the note fell due in December, 1927, it was not presented to A. for payment, and no notice was given to R. that the note had not been paid. In October, 1928, the note not being paid, R. told the plaintiff that he would not be surety any longer. At the time of the commencement of this action A. was insolvent:—

*Held*, that it was of no consequence that R. signed not on the back of the note, but on its face, beneath the name of A.: the "endorsement" may be on any part of the instrument, even on the face.

*A. D. Gorrie Ltd. v. Whitfield and Michaud* (1920), 48 O.L.R. 605, followed.

Sections 96, 131, 184, and 186 of the Bills of Exchange Act, R.S.C. 1927, ch. 16, considered.

And *held*, that R. was liable upon the note as an endorser, and so was entitled to avail himself of the defences of non-presentation of the note for payment and non-receipt of notice of dishonour.

*Gallagher v. Murphy and Gilroy*, [1929] S.C.R. 288, followed.

The suggestion in *Hough v. Kennedy* (1910), 3 Alta. L.R. 114, that there is a borderland in which an accommodation co-maker is not entitled to strict notice of dishonour, is untenable.

There was no binding agreement for an extension of time to A. after the maturity of the note, and R. was not released on that ground.

R. was, however, released by the acceptance by the plaintiff from A. in September, 1929, of interest on the note to December of that year, being a payment of interest in advance, and R. should have leave to amend his pleadings by raising this defence.

Upon the defences sustained, the action was dismissed as against R.

AN action upon a promissory note.

The action was tried before RANEY, J., without a jury, at Walkerton.

*C. Grant*, for the plaintiff.

*N. R. Robertson*, for the defendant Russwurm.

June 23. RANEY, J.:—The plaintiff sues on a promissory note in the following terms:—

"Mildmay, Dec. 1st, 1926.

"One year after date I promise to pay Wm. Kupferschmidt or order the sum of one thousand dollars with interest at five per cent.

"Mathias Ammoneit.

"Philip Russwurm."

Russwurm signed the note as accommodation to Ammoneit. Kupferschmidt knew this; indeed he suggested to Ammoneit that he should ask Russwurm to be his surety.

Ammoneit makes no defence to the action.

When the note fell due in December, 1927, it was not presented to Ammoneit for payment, and no notice was given to Russwurm

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that the note had not been paid. In his evidence Russwurm said that he knew that Ammoneit would not be able to pay the note in a year, and that it would have to be renewed, in part at least. Neither did the plaintiff expect the note to be paid at the end of the first year.

The plaintiff held another and earlier note signed by Ammoneit and his daughter Johanna for a smaller amount. A balance remained unpaid on this note in 1927, and the plaintiff told Ammoneit that he wished this balance paid first—that so long as he got the interest on the \$1,000 note there would be no hurry about the payment of the principal. Similar statements were repeated by the plaintiff to Ammoneit during 1928 and afterwards. The balance of the Johanna note was not paid until July, 1929. In the meantime the plaintiff was getting into financial difficulties, and in October, 1928, Russwurm consulted solicitors who wrote to J. A. Johnston, a conveyancer at Mildmay, who acted as agent for the plaintiff, suggesting that the plaintiff sue on the note and get judgment, and that, if the amount of the note was not realised on execution, Russwurm would pay half of the deficiency.

Later on, in the same month, Russwurm visited the plaintiff and told him that he would not be surety any longer. In consequence of the letter, or of this visit, or perhaps both, the plaintiff went to see Ammoneit and asked him to see Russwurm and get him to renew the note. Ammoneit saw Russwurm, but Russwurm declined to renew the note.

Ammoneit's farm was sold by the mortgagee, and at the time of the commencement of this action Ammoneit was insolvent.

It is suggested in the pleadings and in the evidence that if the plaintiff had taken proceedings when the note fell due in December, 1927, he could have realised the amount of the note, or at least a portion of it—but I think that is entirely problematical.

The defendant's other defences raised by his pleading are: (1) that there was no presentation of the note by the plaintiff to Ammoneit for payment; (2) that there was no notice of dishonour of the note by non-payment; (3) that the plaintiff gave an extension of time to Ammoneit without the knowledge and consent of Russwurm.

The validity of defences (1) and (2) depends on the question whether the defendant was an endorser of the note, or mere-

ly a surety for its payment—in other words, whether the law of negotiable instruments is applicable, or the law of principal and surety. If the defendant was an endorser, then he is not liable unless there was presentment and notice of dishonour. If he was merely a surety, then these defences are not open to him.

Summarising the old authorities, Rowlatt, in his book on Principal and Surety, 2nd ed. (1926), at pp. 144, 145, states the law as to suretyship for negotiable instruments in these terms: "A surety for payment of a bill or note by the acceptor is liable, though it is never presented, as it is his duty to see it is paid. . . . But where the principal is liable without demand, so is the surety."

But if the law applicable to the case is the law as to bills of exchange and promissory notes, then the Bills of Exchange Act, R.S.C. 1927, ch. 16, covers the case. Section 131 of that Act provides that "when a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of this Act respecting endorsers;" and sec. 96 provides that, when a bill has been dishonoured for non-payment, notice of dishonour must be given to the endorser. Section 186 makes these sections applicable to promissory notes, and sec. 184 provides that presentment for payment is necessary in order to render the endorser of a note liable.

It is of no consequence that the defendant Russwurm in this case signed, not on the back of the note, but on its face, under the name of the principal debtor. "Endorsement" literally means writing a name on the back of a bill or note, but the endorsement may be on any part of the instrument, even on the face." *A. D. Gorrie Co. Ltd. v. Whitfield and Michaud* (1920), 48 O.L.R. 605.

The language of sec. 131 seems simple and clear enough, but it has taken a good many years to bring about its full acceptance by the courts and the text-writers, some of the Judges and authors clinging to the view that, notwithstanding the section, the liability of a stranger to the note, who endorses it, is that of a surety.

Counsel for the plaintiff cites Falconbridge on Banking and Bills of Exchange, 4th ed. (1929). p. 701. for the proposition that the maker of a promissory note is not entitled to notice of dishonour, even though he be an accommodation maker to the knowledge of the holder. The learned author cites *Hough v. Kennedy*

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Raney. J. (1910), 3 Alta. L.R. 114, for this statement of the law. The head-note of that case states the law to be that the maker of a note who signs as an accommodation maker or guarantor for his co-maker is not entitled to strict notice of dishonour in the same manner as an endorser is entitled, even though the payee of the note was aware when he received it that the maker was only a guarantor or surety. Mr. Justice Stuart, who wrote the judgment of the Court *en banc*, in the course of his reasons, relies for his conclusion mainly on English and American authorities, and neither *Robinson v. Mann* (1901), 31 Can. S.C.R. 484, nor any of the Ontario cases which had followed that case (see MacLaren on Bills Notes and Cheques, 5th ed. (1916), p. 335), were referred to on the argument or cited in Mr. Justice Stuart's reasons.

In *Robinson v. Mann* it was held that a person who endorses a promissory note not endorsed by the payee—what is sometimes called an anomalous endorser, and what in the civil law is called an endorser *pour aval*—may be liable as an endorser to the latter.

*Robinson v. Mann* was reaffirmed by the Supreme Court of Canada in *Grant v. Scott* (1919), 59 Can. S.C.R. 227, Mr. Justice Anglin, remarking at p. 228:—

“The appellant, intending to become a surety for the maker or the payee, wrote his name across the back of a promissory note. On precisely similar facts this Court in *Robinson v. Mann* held the defendant liable as an endorser by virtue of section 56 of the ‘Bills of Exchange Act’ of 1890—now section 131 of R.S.C. 1906, ch. 119, made applicable to promissory notes by section 186. That decision has been uniformly accepted as the law of Canada in the provincial courts and by text-writers of repute.”

Speaking of the cases in the Supreme Court of Canada, above-mentioned, Mr. Falconbridge, at pp. 753 and 754 of his book, says:—

“After it had been followed in various provincial courts, the decision in *Robinson v. Mann* was affirmed and approved by the Supreme Court of Canada in *Grant v. Scott*. It would appear, however, that *Robinson v. Mann* and *Grant v. Scott* will now require to be reconsidered. In each case the court relied upon sec. 131, notwithstanding that the person to whom the anomalous endorser was held to be liable was the payee, who, by virtue of the decision of the House of Lords in *Jones v. Waring*, cannot be a holder in due course. It is, of course, open to a court to say that,

strictly read, the words 'and is subject to all the provisions of this Act respecting endorsers,' which in the Canadian Act have been added so inartistically at the end of sec. 131, are not referable to the holder in due course already mentioned in the section and are sufficient to render the anomalous endorser liable to a payee; but the words in question are, to say the least, obscure, and some mental ingenuity is necessary in order to give them any meaning."

But whatever cause for doubt there may have been has now been set at rest by *Gallagher v. Murphy and Gilroy*, [1929] S.C.R. 288. At p. 295, Mr. Justice Rinfret, speaking for the majority of the Court, discusses the question:—

"Gilroy contended that the recent decision of the House of Lords in *R. E. Jones Ltd. v. Waring & Gillow* had the effect of overruling *Robinson v. Mann*. We do not think so. . . .

"We do not accept the proposition that, by force of sec. 131, one who signs a bill otherwise than as drawer or acceptor incurs liability only towards a holder in due course, nor do we understand the decision in *Robinson v. Mann* to have depended upon the ground (although that view is no doubt expressed) that the payee was looked upon as a holder in due course. . . .

"The corresponding section in the English Act does not contain the words 'and is subject to all the provisions of this Act respecting endorsers.' Ever since *Robinson v. Mann* was decided, it has been considered that this addition was made in our Canadian statute with the 'intention of adopting the principle of the "aval," as already in force in the Province of Quebec.'"

And at p. 296: "It is the addition of the concluding words of sec. 131 which distinguishes the Dominion from the corresponding English section and makes clear the intention to introduce into our law the principle of the 'aval.' That we understand to have been the view taken in this Court both in *Robinson v. Mann* and *Grant v. Scott*; and, notwithstanding the suggestion made by the distinguished author of 'Falconbridge on Banking and Bills of Exchange,' 4th ed., at p. 753, we do not regard those decisions as open for reconsideration here merely because of the holding by the House of Lords in *R. E. Jones Ltd. v. Waring & Gillow Ltd.*, that the payee of a note is not a holder of it in due course."

The suggestion in *Hough v. Kennedy*, *supra*, that there is a borderland in which an accommodation co-maker of a note is not entitled to strict notice of dishonour—in other words, as Mr.

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Raney, J. Falconbridge puts it, "is a quasi-endorser," appears to be quite untenable. Either the surety is within the sections of the Bills of Exchange Act which protect an endorser, or he is not. The test appears to be whether his name is endorsed on the note. If it is, whether with words of guarantee or without, he is an endorser. If his liability arises on a separate instrument, then, in the absence of a special stipulation, his liability is the larger liability of a surety. If I am right as to this, then it seems clear that Russwurm was liable on the note in question as an endorser, and so, is entitled to avail himself of the defences of non-presentation of the note for payment and non-receipt of notice of dishonour.

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On the argument that Russwurm was released by an agreement by the plaintiff to grant an extension of time to Ammoneit after the maturity of the note, I am of opinion that there was no binding agreement for an extension, and, that being so, Russwurm was not released on that ground.

A point in the case not raised in the pleadings, but brought out in the evidence and stressed in argument, was that Russwurm had been released by the acceptance by Kupferschmidt from Ammoneit in September, 1929, of interest on the note to December of that year; this being a payment of interest in advance. In *Ryan v. McKerral* (1888), 15 O.R. 460, at p. 467, Mr. Justice Rose, delivering the judgment of the Court, dealt with this question: —

"Then as to the remaining question, which affects the plaintiff's claim in respect of the \$300 note, I am of opinion that the plaintiff, by accepting interest from the other makers of the note up to the 14th October, 1882, precluded himself from enforcing, as against them, payment of the principal between the 8th August and 14th October; and this was such a giving of time for valuable consideration as discharges the defendant as surety from liability on the note."

The defendant will have leave to amend his pleading to raise this defence.

The action fails and will be dismissed with costs.

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*Contract—Agreement in Form of Lease—Service Station—Supply of Gas and Equipment—Covenant not to Purchase except from Plaintiff—Injunction to Restrain Breach—Liquidated Damages or Penalty—Covenants not Running with Land—Plaintiff Mortgagee and Owner of Legal Estate—Affirmative Covenants Restrictive in Substance—Clog on Equity of Redemption—Nominal Damages.*

By an agreement made in April, 1930, purporting to be a lease made in pursuance of the Short Forms of Leases Act, the defendant A. T. was designated the lessor and the plaintiff company the lessee. By it the lessor purported to demise the exclusive privilege of installing oil and gasoline dispensing equipment in the service station owned by the lessor, for the term of 5 years from the 1st May, 1930. The rent received was \$1 per year, payable in advance on the 5th day of May in each year. It also provided that the lessee should lend to the lessor \$3,500, secured by a first mortgage on the service station property, for a term of 5 years, with interest at 7 per cent. per annum, payable annually; and the lessee agreed to lend to the lessor for the entire period of the lease the necessary equipment for dispensing oil and gasoline. In consideration of the lease, the lessor agreed that for the period mentioned she would purchase from the lessee, exclusively, all supplies of gasoline, oils, etc., at certain prices. It was also agreed that, should the lessor dispose of her business during the term of the lease, she would procure from the purchaser a covenant to carry out all the terms and covenants of the lease. Also that if the lessor made default in any of the agreements contained in the lease she would forfeit and pay to the lessee \$3,500 as liquidated damages and not as a penalty. The lessor further agreed to keep her service station open in the usual business hours during the term of the lease, and not to pump any other gasoline on the premises than that sold by the lessee. And the covenants and agreements were to be binding upon the respective heirs, executors, etc., of the parties.

In December, 1930, the defendant A. T. conveyed the lands on which the service station stood to the defendant P., who was then aware of the existence of the agreement, but did not execute a covenant to observe its provisions, nor was any covenant tendered to her for execution. The defendant P., in April, 1931, permitted two gasoline tanks and a pump not belonging to the plaintiff company to be brought on the lands and excavation to be made on the premises preparatory to the sinking into the ground of the tanks. By this action the plaintiff company sought to restrain the defendant P. from permitting the tanks and equipment to be installed and claimed from the defendants A. T. and W. R. T. damages for breach of the agreement. The defendants A. T. and W. R. T. did not enter an appearance, and the pleadings were noted closed as against them:—

*Held*, that, though the agreement was in the form of a lease, it was in reality a licence, and therefore the relations between landlord and tenant did not exist.

*Town of Brockville v. Dobbie and Ritchie* (1929), 64 O.L.R. 75, applied and followed.

2. That the burden of a covenant not involving a grant never runs with the land except as between landlord and tenant.

*Austerberry v. Oldham Corporation* (1885), 29 Ch. D. 750, applied and followed.

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The fact that the plaintiff company was the mortgagee of the land, and therefore the owner of the legal estate, was not sufficient to take the case out of the rule.

3. The covenants in the agreement, though affirmative in form, are restrictive in substance, and therefore a breach thereof may be enjoined.

*Clegg v. Hands* (1890), 44 Ch. D. 503, followed.

4. The plaintiff company as mortgagee had sufficient interest or estate in the land included in its mortgage to make a valid stipulation governing the use of the land to which the mortgagor or his successor in title might put it.

The doctrine of *Tulk v. Moxhay* (1848), 2 Ph. 774, applies to restrictive covenants only, and was applicable here, although the plaintiff company had no adjoining lands to the benefit of which it could reasonably be inferred that the covenants were intended to enure.

*Besinnett v. White* (1925), 58 O.L.R. 125, applied.

*London County Council v. Allen*, [1914] 3 K.B. 642, distinguished.

5. The agreement does not create a clog on the equity of redemption so as to render the agreement invalid.

*G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.*, [1914] A.C. 25, followed.

The stipulation in the agreement as to damages is to be regarded as a penalty; and, so regarding it, the Court has jurisdiction to award an injunction to prevent a breach of the agreement.

*Forrest v. Merry & Cunninghame Ltd.*, [1909] A.C. 417, and *Mason v. Provident Clothing and Supply Co. Ltd.*, [1913] A.C. 724, followed.

6. The plaintiff company was entitled to the injunction claimed with costs against the defendant P. and nominal damages.

IN this action the plaintiff claimed an injunction restraining the defendant Pauley from purchasing gasoline or oil or other accessories in connection with her service station from any person other than the plaintiff company and from installing oil and gasoline equipment other than that supplied by the plaintiff, and for damages for breach of a certain contract made between the plaintiff company and the defendants Alice E. Tonkin and W. R. Tonkin. The Tonkin defendants did not enter an appearance, the pleadings were noted closed against them, and they were not represented at the trial.

The action was tried before WRIGHT, J., without a jury, at Whitby.

A. W. S. Greer, for the plaintiff company.

A. F. Annis, for the defendant Pauley.

June 25. WRIGHT, J.:—At the trial certain admissions of fact were made by counsel, and the same were reduced to writing and filed as an exhibit. The material admissions of fact are as follows:—

(1) That the plaintiff company carries on business throughout the Province of Ontario as vendor and general dealer in gasoline,

oils, and in the equipment used with respect to the dispensing of the same, and is owner of a gasoline service station situate five blocks or 522 yards east of the lands referred to in this action.

(2) The defendant Alice E. Tonkin was, prior to and on the 18th April, 1930, the registered owner of certain lands in the township of East Whitby, about three blocks west of the western limit of the city of Oshawa, and the defendant W. R. Tonkin is her husband.

(3) The defendant Alma Pauley is the present owner of the lands and premises formerly owned by her co-defendant Alice E. Tonkin.

(4) The lands in question were, prior to April, 1930, in use as a garage and service station.

(5) On the 18th April, 1930, the defendant Alice E. Tonkin mortgaged the lands in question to the plaintiff to secure payment of the sum of \$3,500 and interest as therein provided, and the moneys secured by the said mortgage were duly advanced to the mortgagor. The mortgage is not in default, but still remains a charge against the property.

(6) On the 18th April, 1930, the defendant Alice E. Tonkin entered into an agreement with the plaintiff company, which agreement forms the basis of this action, and will be referred to in greater detail at a later stage. This agreement was not registered until April, 1931.

(7) An agreement, by way of offer and exchange, bearing date the 21st November, 1930, was entered into between the defendant Alice E. Tonkin and the defendant Alma Pauley, whereby the former agreed to sell and the latter agreed to purchase the lands in question herein.

(8) By deed dated the 23rd December, 1930, the defendant Alice E. Tonkin conveyed the lands in question to the defendant Alma Pauley, subject to the mortgage already referred to.

(9) The defendant Alma Pauley was, at the date of the afore-said conveyance, aware of the existence of the agreement in question.

(10) The defendant Alma Pauley did not execute a covenant to observe the provisions of the agreement, nor was any document containing such a covenant tendered to her for execution.

(11) Since the 29th December, 1930, the defendant Alma Pauley has erected a modern service station on the premises and has made very considerable additions thereto.

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(12) The plaintiff company has, since the 29th December, 1930, furnished, and still is furnishing, the defendant Alma Pauley with gasoline and oils.

(13) The plaintiff has, prior to this action, refused or declined to furnish to the defendant Alma Pauley service station equipment for the purpose of dispensing gasoline other than that which was furnished to the defendant Tonkin.

(14) The plaintiff has not paid to the defendant Alma Pauley the rental of \$1 mentioned in the agreement of the 18th April, 1930, nor has the same been tendered to her.

(15) The defendant Alma Pauley, during the month of April, 1931, permitted two large gasoline tanks not belonging to the plaintiff company and one pump capable of being used in connection with the vending of gasoline to be brought on to the lands in question, and did permit excavation to be made on the said premises preparatory to the sinking into the ground and the reception of the said tanks.

(16) The defendant Alma Pauley did, during the month of April, 1931, enter into a contract with a company, other than the plaintiff, purporting to permit it to install a tank and gasoline dispensing equipment on the said premises.

It is also admitted that an interim injunction was obtained on the 8th May, 1930, which was afterwards continued to the trial, restraining the defendant Alma Pauley from permitting the said tanks and gasoline dispensing equipment to be installed.

At this point I think it opportune to set out the provisions of the agreement of the 18th April, 1930, already referred to.

It purported to be made in pursuance of the Short Forms of Leases Act, and in it the defendant Alice E. Tonkin was designated as the lessor and the plaintiff company as the lessee. By it the lessor purported to demise and lease unto the lessee the exclusive privilege of installing oil and gasoline dispensing equipment in or about the service station owned by the lessor, and situate in the Westmount district of the provincial highway, at the western entrance to the city of Oshawa, as more particularly set forth and described in the said document.

"To have and to hold the said privilege to the said lessee for and during the term of five years to be computed from the 1st day of May, 1930, and thenceforth next ensuing and fully to be complete and ended on the 4th day of May, 1935."

The rent reserved was the sum of \$1 per year, payable in advance on the 5th day of May in each and every year.

It also provided, as a further consideration, that the lessee should lend to the lessor the sum of \$3,500, secured by a first mortgage on the service station property already described, for a term of five years, with interest at 7 per cent. per annum, payable annually. Further, that the lessee, as a further consideration, agreed to lend to the lessor for the entire period of the lease the necessary equipment for dispensing oil and gasoline.

The lessor also agreed to keep the said equipment in good order and working condition during the term of the lease.

Then followed the following material and specially important clauses:—

“In consideration of this lease the lessor agrees that for the period mentioned in this agreement she will purchase from Cities Service Oil Company Limited, exclusively, all supplies of gasoline, oils, soaps, greases, and anti-freeze, at regular tank-wagon prices for gasoline and kerosene and the company’s regular wholesale price on all other products, which shall or may be used or sold on the premises where the said equipment is installed, used or kept, all supplies to be delivered when and as required by the said party of the third part.

“It is hereby agreed that, should the lessor dispose of her business during the lifetime of this lease, she, the said lessor, will procure from the purchaser a covenant from him that he will fulfil and carry out all the terms and covenants of this lease.

“It is hereby agreed by and between the parties hereto that should the lessor make default in any of the agreements, covenants or stipulations, herein contained, then she, the said lessor, shall forfeit and pay to the said lessee the sum of \$3,500 by way of liquidated damages and not as a penalty.

“The said lessor further agrees to keep her service station open during the usual business hours observed by gasoline service stations during the term of this lease, and not to pump any other gasoline on the premises except that sold by the said lessee.

“It is hereby agreed that wherever the singular is used it may, if necessary, be construed as if the plural had been used, and the covenants and agreements are to extend to and be binding upon the respective heirs, executors, administrators, and assigns of the parties hereto.”

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As appears from these admissions, the defendant Pauley has erected or is about to erect and operate gasoline pumps, and other equipment than that supplied by the plaintiff, and this, the plaintiff claims, is in breach of the agreement already referred to.

The plaintiff brings this action claiming from the defendants Alice E. Tonkin and William R. Tonkin damages for the breach of the said agreement; (2) an injunction restraining the defendants from installing oil and gasoline dispensing equipment other than that belonging to and provided by the plaintiff, and from dispensing, purchasing or selling, any products other than those supplied or to be supplied by the plaintiffs.

It should be here mentioned that the defendants Alice E. Tonkin and William R. Tonkin did not enter an appearance and the pleadings were noted closed against them and they were not represented at the trial.

The contentions of the plaintiff may be summarised thus:—

(1) That the burden of the agreement of the 18th April, 1930, runs with the lands, and is therefore binding upon the defendant Pauley as the owner thereof, she having purchased the property with full notice and knowledge of the agreement.

(2) If the said agreement does not run with the land, then the defendant is bound to observe the provisions of the said agreement, and to abstain from using the land in a manner prohibited thereby, in accordance with the principles laid down in *Tulk v. Moxhay* (1848), 2 Ph. 774.

For the defendant it is contended:—

That the burden of the agreement in question does not run with the land, but is a mere personal covenant.

That the covenants in the said agreement are not negative in form and cannot be enforced by injunction.

That the plaintiff does not own any land adjoining that mentioned in the agreement for the benefit of which the covenant or agreement could be deemed to have been entered into, so that it cannot enforce the covenant if it does not run with the land.

That the agreement in question provides for the payment of damages for breach of the same, and therefore an injunction is not the proper remedy, nor one which can be invoked by the plaintiff in this action, and the plaintiff is restricted to relief by way of damages.

As to the nature of the agreement in question, it will be noted that it is in the form of a lease; but, applying the principles

enunciated in *Town of Brockville v. Dobbie and Ritchie* (1929), 64 O.L.R. 75, it will at once appear that the document in question is not a lease, but a licence, and therefore the relations between landlord and tenant did not exist in the present case.

The question as to whether or not the covenants run with the land is somewhat difficult; but I adopt the principles laid down in *Austerberry v. Oldham Corporation* (1885), 29 Ch. D. 750, where the Court of Appeal stated, by way of opinion but not of decision, that the burden of a covenant not involving a grant never runs with the land except as between landlord and tenant. See particularly the judgment of Cotton, L.J., at p. 776. This was referred to with approval by Buckley, L.J., in *London County Council v. Allen*, [1914] 3 K.B. 642 (see p. 659).

It is true in this case that the plaintiff is the mortgagee of the land in question, and therefore the owner of the legal estate, but I do not think that is sufficient to take the case out of the rule already stated.

It is significant that the agreement provides that in case of sale of the premises in question the lessor (i.e. the defendant Alice E. Tonkin) would procure from the purchaser a covenant from him that he would fulfil and carry out all the terms and covenants of the lease.

This lends weight to the argument that the parties did not intend that the covenants should run with the land, nor did they regard the lease as having such an effect.

The next point for consideration is whether the principle laid down in *Tulk v. Moxhay* applies. As stated by Mr. Justice Middleton in *Ferris v. Ellis* (1920), 48 O.L.R. 374, at p. 378, the doctrine of that case applies to restrictive covenants only.

It will be observed that the covenants under discussion are not negative in form; but I am of opinion that, though affirmative in form, they involve a negative in substance.

In the present instance the covenant that the owners would purchase exclusively from the plaintiff involves an agreement that they would not deal with others.

The conclusion is irresistible that these covenants are restrictive in substance, and therefore a breach of the same could be enjoined.

See *Clegg v. Hands* (1890), 44 Ch. D. 503; Kerr on Injunctions, 6th ed., p. 457 *et seq.*, and cases there cited.

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It is strenuously argued that the doctrine laid down in *Tulk v. Moxhay* cannot apply here, as the plaintiff company had not and has not any adjoining lands to the benefit of which it can reasonably be inferred the covenants in question were intended to enure.

The question under consideration is dealt with by Mr. Justice Middleton in *Besinnett v. White* (1925), 58 O.L.R. 125.

In most of the decisions dealt with by that learned Judge the covenantee owned adjacent or adjoining properties, but in summarising his conclusions Mr. Justice Middleton expressed certain views which are particularly helpful in solving the problem now being considered, in the following language reported at pp. 128 and 129:—

“From this I conclude that the question is in each case one of intention—was the covenant taken to protect or benefit land in which the covenantee had an interest, using this term in its widest sense, or was it merely personal and collateral to the conveyance? If the former, then so long as the interest intended to be protected remains, or is augmented as in the case in hand, there is no reason why the Court should not compel the covenantor, or those who claim under him with notice of the covenant, to regard the terms of the covenant. The question in each case is one of substance and reality and not of technicality.”

Here the plaintiff company had a service station at a considerable distance from the land in question, and it would be of some benefit or advantage that competition be limited, which would be effected to some extent by enforcing the agreement.

The plaintiff as mortgagee has the legal estate in the land in question, and apparently the moneys were advanced to the mortgagor on the strength of the agreement that she would deal exclusively with the plaintiff. This would result in a direct benefit to the plaintiff as mortgagee of the land by increasing the revenue to be derived from the same. In either case the covenant enures to the benefit of the plaintiff's land and thus the principle of the decisions referred to applies here.

The decision in *London County Council v. Allen*, *supra*, is not applicable here, as in that case the covenantees did not possess, nor were they interested in, any neighbouring land for the benefit of which the covenant was imposed, while here the plaintiff company is, in addition to being interested in neighbouring land,

interested in the identical land in respect of which the covenant is imposed. Wright, J.

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It would occur to me that, if an agreement of the nature in question was entered into between two tenants in common of land, a situation analogous to that existing here would be created, and it could hardly be said that one of the tenants in common had not sufficient interest or estate to enforce such an agreement.

Surely a mortgagee has sufficient interest or estate in the land included in his mortgage to make a valid stipulation governing the use of the land to which the mortgagor or his successor in title might put it.

During my consideration of this case a point not specifically dealt with in the argument has presented itself to my mind, and has caused me considerable doubt as to its validity and effect.

It is this. Does the agreement create a clog on the equity of redemption and thus render the agreement invalid?

Some of the earlier decisions, notably *Noakes & Co. Ltd. v. Rice*, [1902] A.C. 24, appear to favour the view that it does create a clog on the equity of redemption, but the decision of the House of Lords in *G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.*, [1914] A.C. 25, sets at rest all doubts as to the effect of such an agreement. In that case an agreement having features somewhat similar to the one under consideration was held valid, as being a collateral contract entered into as a condition for obtaining the loan and not as forming a clog on the equity of redemption or repugnant to the right to redeem.

It was also argued that, as the agreement stipulated for the payment of \$3,500 (the amount of the mortgage, though not so mentioned) as liquidated damages for the breach thereof, the plaintiff was restricted to such relief and is not entitled to an injunction.

My conclusion is that the stipulation in question is by way of penalty and not as liquidated damages. That it has been described as the latter is not conclusive of its nature, but the intention of the parties is to be gathered from the nature of the agreement and the language of the whole instrument taken together, regard being had to all the circumstances of the case at the time the agreement was made: Kerr, on Injunctions, 6th ed., p. 451, and cases there cited. Here one penalty is provided for all or any breaches of the agreement, however serious or trifling,

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and it is quite clear that it ought to be regarded as a penalty and not as liquidated damages.

Regarding the stipulation as a penalty, it is quite clear that the Court has jurisdiction to award an injunction to prevent the breach of the agreement.

See *Forrest v. Merry & Cunninghame Ltd.*, [1909] A.C. 417; *Mason v. Provident Clothing and Supply Co. Ltd.*, [1913] A.C. 724, 730.

Applying the principle of these decisions, it is evident that the contention of the defendant Pauley on this point cannot prevail.

The defendant Pauley further contended that the plaintiff company had not fulfilled its part of the agreement in that it had not kept the equipment in proper repair, and therefore that the defendant was released from her liability to observe the terms of the agreement.

The evidence failed to establish this contention, and it can be dismissed from further consideration. The agreement also provided that the equipment should be kept in repair by the defendant Alice E. Tonkin, the predecessor in title of the defendant Pauley, and this completely disposes of the argument on this question.

My conclusion on the whole case is that the plaintiff is entitled to the injunction claimed, with costs against the defendant Pauley and nominal damages fixed at \$1. No evidence was given as to any damages chargeable against the other defendants, but, if the plaintiff so elects, there will be a reference as to these to the Local Master at Whitby.

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[APPELLATE DIVISION.]

1931.

BODDY v. CARPENTER.

June 26.

*Will—Destruction of—Whether Done by the Testator Animo Revocandi—Evidence—Declarations by the Deceased—Admissibility—Rebuttal of Presumption.*

Upon an appeal from the judgment of a Surrogate Court dismissing an application for probate of a will of C. dated the 6th February, 1928, and admitting to probate a later will dated the 9th May, 1928, which could not be found upon C.'s decease in October, 1928, but the contents of which was well proved in the Surrogate Court, the question was, whether the will of May ought to be admitted to probate or whether C. died intestate—whether, by the circumstances estab-

lished in evidence, the presumption of law that the will was destroyed by the deceased *animo revocandi* had been overcome:—

*Held*, by the majority of the Court (RIDDELL and ORDE, JJ.A., *dubitantibus*), that the presumption was so attenuated by the declarations made by the testator and by evidence of opportunity for removal of the will after the testator's death, and by the circumstance that after his death money was stolen from his house, as to be negligible, and that the will of May was properly admitted to probate.

The statements of the testator regarding his intentions were not to be altogether excluded from consideration—they afforded an element entitled to serious consideration.

*Lefebvre v. Major* (1929), 64 O.L.R. 43, and [1930] S.C.R. 252, followed.

AN appeal by E. Carpenter, W. R. Catton, and S. Catton, from an order of HARDY, Judge of the Surrogate Court of the County of Brant, dismissing an application for probate of a will of the late C. W. Carpenter, dated the 6th February, 1928, and admitting to probate a will dated the 9th May, 1928.

May 11. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

W. T. Henderson, K.C., for the appellants, argued that the evidence and circumstances supported the presumption of law that the will of the 9th May, 1928, was destroyed by the deceased. This presumption has not been rebutted; and, it having been shewn that this will revoked the previous will of the 6th February, 1928, the conclusion of law is that the deceased died intestate. Reference to *Lefebvre v. Major* (1929), 64 O.L.R. 43, and [1930] S.C.R. 252.

R. S. Coultter, K.C., for the respondent, contended that the evidence established such facts and circumstances as to rebut the presumption of destruction of the will of the 9th May, 1928, by the testator, *animo cancellandi*.

Henderson, K.C., in reply, said that the judgment appealed from was based on suspicion, which was wrong. Reference to *Stewart v. Walker* (1903), 6 O.L.R. 495.

June 26. MASTEN, J.A.:—Appeal by Ellen Carpenter, William R. Catton, and Sophronia Catton, from the judgment of the Surrogate Court of Brant dated the 3rd February, 1931, whereby it was adjudged as follows:—

"2. This Court doth order and adjudge that the application of the plaintiffs to have admitted to probate the will of Charles Wellington Carpenter, deceased, dated the 6th February, 1928, be and the same is hereby dismissed.

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1931.      of the said Charles Wellington Carpenter, deceased, dated the 9th  
BODDY      May, 1928, is the true last will and testament of the said deceas-  
v.      ed, and that the same be admitted to probate, subject to the order  
CARPENTER.      to be made upon the applicant therefor filing in the office of the  
Masten, J.A.      Registrar of this Court all necessary proofs and papers to lead to  
grant thereof."

The proceedings leading up to the pronouncement of the judgment here in appeal are thus stated by the learned trial Judge in his reasons for judgment:—

"This was an application to have admitted to probate the will of Charles Wellington Carpenter, dated the 6th February, 1928.

"At a previous hearing it was found that a later will had been made on the 9th May, 1928, revoking the will of the 6th February, 1928. This will of the 9th May, though lost, was abundantly proved by the solicitor who drew it and from the shorthand notes read by the stenographer, and no dispute arises as to its contents.

"At the first trial the result was that an intestacy existed, and it was so declared.

"An application was subsequently made for a new trial, upon the discovery of new evidence by the son William Sturgeon Carpenter, to have the will of the 9th May, 1928, admitted to probate as the last will and testament of Charles Wellington Carpenter, deceased.

"This application being granted, the case proceeded for rehearing, and the evidence was heard on the 17th December last."

This phraseology is perhaps not entirely happy, for a new trial or a rehearing can be directed only by this Court, on appeal to it under sec. 34 of the Surrogate Courts Act. Nevertheless the Court below undoubtedly had jurisdiction, under secs. 19 and 20 of the Surrogate Courts Act, to revoke the letters of administration theretofore granted and to decree probate of the testator's last will, if established. The jurisdiction of the Court below was not questioned before us, and I refer to the matter only to preclude any misconception respecting the powers of the Surrogate Court.

It is not in controversy that the will of the 6th February, 1928, was revoked by the next succeeding will of the 9th May, 1928, whether the latter is admitted to probate or not. The real question for determination is, whether the will of the 9th May,

1928, ought to be admitted to probate, or whether Charles Wellington Carpenter died intestate. App. Div.  
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The will of the 9th May, 1928, is traced into the possession of the deceased. It is not forthcoming, and the problem is, whether, by the circumstances established in evidence, the presumption of law that the will was destroyed by the deceased *animo revocandi* has been overcome. As has been often stated, that issue is purely one of fact. Cases decided on other facts afford little assistance, and *tot homines quot sententiae*. BODDY  
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Masten, J.A.

As regards the law, I cannot usefully add to what was said in this Court and in the Supreme Court of Canada in the case of *Lefebvre v. Major*, 64 O.L.R. 43, [1930] S.C.R. 252, except by observing that the rule of evidence regarding expressions by the testator of his intentions ought not to be pressed to extremes. While bearing in mind and giving due weight to the warnings of ancient sages of the law, I think that the statements of this testator regarding his intentions are not to be peremptorily excluded from consideration, and that these statements do afford an element entitled to serious consideration in determining the present question: Has the presumption of revocation been rebutted?

In this aspect it becomes a question of fact, i.e. of the weight which, in the light of all the evidence, the Court will attach to the statements of the testator. In this case the evidence impels me to attach to the statements of the testator more weight than they carry in the minds of some of my brethren.

I refer particularly to the following evidence:—

At p. 19 Miss Fenny, referring to the will of the 9th May, 1928, says:—

“Q. And after the will was executed what was done with it?  
A. It was put in the safe in Mr. Lindsay’s office.

“Q. How long did it remain there? A. It was there for some time, and Mr. Carpenter came in a short time before his death and asked for the will.

“Q. What did he say? A. He said he was going to put it in a safety box in the bank.

“Q. What happened, did you give him the will? A. Yes, I did. Mr. Lindsay was busy in his private office and Mr. Carpenter had waited for some time and he asked me for the will and I gave it to him.

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"Q. This was the same will of which this is a copy? A. Yes.

"Q. That was shortly before his death? A. Yes, I don't remember the date, probably a week or so, I could not say."

The witness Wm. Patterson, a friend who conversed with the testator some three days before his death, gives, at pp. 45 and 46, evidence corroborative of that of Miss Fenny.

Lastly we have the evidence of Zeno Deagle, an old friend, who visited the testator on Tuesday (probably two days before his death). Some of the details of the story of this witness I am unable to accept, though it seems to have been fully credited by the experienced trial Judge, who heard the witness and observed his demeanour—but I am also unable to reject it wholly, or to say that it does not afford some evidence of the intention of the testator that the will of the 9th February, 1928, was to be his last will.

The question to be determined on this appeal is not, "Is there adequate evidence that the son-in-law, Wm. R. Catton, took away or destroyed the will of the 9th May, 1928? But the issue is (as stated above), "Is there evidence sufficient to rebut the presumption of law that the will was destroyed by the testator *animo revocandi*?"

On that question the Court must consider all the circumstances and weigh the whole of the evidence, including the *ante mortem* declarations of the testator.

These declarations are therefore to be considered along with the evidence that some person had access to the testator's house and that silver coins and probably a considerable sum in bills were, after the testator's death, stolen from the premises. On the evidence some person who had access to the premises was guilty of a criminal act, and the legal presumption against commission of a crime is weakened if not destroyed.

The declarations of the testator weaken the presumption that the will was destroyed by him. The effect of these declarations is supported and fortified, and the presumption is further weakened, by evidence of opportunity for removal of the will after the testator's death and by the evidence that after his death money was stolen from the house.

Upon the best consideration that I can give to all the circumstances disclosed in evidence, I think the presumption of destruction by the testator *animo revocandi* is so attenuated as to be negligible, and that the will should be admitted to probate.

In reaching that conclusion, I have not overlooked the evidence of Mr. Boddy, which greatly weakens the evidence of Zeno Deagle, nor have I omitted consideration of the friendly relations of the testator with his daughter Sophronia Catton and her husband.

Without resiling in any way from the rule which I endeavoured to express in *Lefebvre v. Major*, I am fully satisfied that this will was not destroyed by the testator *animo revocandi*, and that the appeal should be dismissed with costs.

LATCHFORD, C.J.:—I have little to add to the observations of my brother Masten favouring the dismissal of the appeal. It is not a case where it has been made to appear that the deceased *destroyed* his last will, but simply one in which that will, in existence a few days before his death, and intended to be preserved, was not to be found after his death, in circumstances almost identical with those in the recent case of *Lefebvre v. Major*. I am accordingly agreeing in the opinion that the ordinary presumption in the case of a will that is missing has been adequately rebutted in this case, and that therefore the appeal fails.

ORDE, J.A., *dubitante*, agreed with MASTEN, J.A.

FISHER, J.A., agreed with MASTEN, J.A.

RIDDELL, J.A.:—While I am not fully convinced of the non-destruction of the will *animo revocandi*, I am not so confident that it is proved to have been so destroyed that I should formally disagree with my learned brethren.

*Appeal dismissed (RIDDELL and ORDE; JJ.A., dubitantibus).*

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[APPELLATE DIVISION.]

REX V. SINGER ET AL.

1931.

*Criminal Law—Illegal Combine—Trade Union—Conspiracy—Combines Investigation Act, R.S.C. 1927, ch. 26—Criminal Code, sec. 498.*

June 26.

The convictions of the defendants S., P., and W., by WRIGHT, J. (1931), *ante* 202, were affirmed on their appeals to the Appellate Division. The acquittal by WRIGHT, J., of the defendants B. and W., was set aside on appeal by the Crown, and they were convicted and fined, it being *held*, that the learned Judge was in error in not distinguishing between the conspiracy itself and overt acts which were evidence of the existence of the conspiracy—their part in the illegal acts was greater than that of P. and W.

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APPEALS by the defendants Singer, Paddon, and Ward from their convictions upon trial before WRIGHT, J., without a jury, upon charges of promoting an unlawful combine and conspiracy; and appeals by the Crown from the dismissal of the charges against the defendants Weinraub and Belyea. The reasons for the judgment of WRIGHT, J., are reported *ante* 202. The appeals were, by leave, against the sentences as well as the convictions of Singer, Paddon, and Ward.

May 26, 27, 28, and 29, and June 1 and 10. The appeals were heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

W. F. O'Connor, K.C., and C. D. Ferrari, for the appellants Singer, Paddon, and Ward, admitted that if the facts were as found, the conclusions arrived at by the learned trial Judge were justified, but the facts were not as found. All the facts proved were as consistent with the innocence of the accused as with their guilt. The evidence did not shew that Singer was a party to any combine to lessen competition, or to enhance prices, or to fix prices, or to limit the facilities for supplying or dealing in supplies, as condemned by the Combines Investigation Act. Nor did the evidence shew that Singer conspired to lessen competition in the sale or supply of articles to the plumber's trade, or to restrain trade in these articles, or to limit the facilities for supplying or dealing in such articles, as prohibited by sec. 498 of the Criminal Code. Any agreement which had been entered into had been made not from a malicious desire to inflict a loss on an individual or class, but from a desire to advance the business interests of employers and employees alike by maintaining the advantages of collective bargaining and control, and there was nothing unlawful in this: *Reynolds v. Shipping Federation Ltd.*, [1924] 1 Ch. 28; *North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.*, [1914] A.C. 461; *Weidman v. Shragge* (1912), 46 Can. S.C.R. 1; *MacEwan v. Toronto General Trusts Corporation* (1917), 54 Can. S.C.R. 381; *Attorney-General for Ontario v. Canadian Wholesale Grocers Association* (1923), 53 O.L.R. 627; *Rex v. Master Plumbers and Steam Fitters Co-operative Association Ltd. et al* (1907), 14 O.L.R. 295; *Rex v. Gage* (No. 1) (1907), 13 Can. Crim. Cas. 415; *Rex v. Gage* (No. 2) (1908), 13 Can. Crim. Cas. 428; *Sorrell v. Smith*, [1925] A.C. 700; *Hardie and Lane Ltd. v. Chilton*, [1928] 2 K.B. 306; *Mogul Steamship Co. v. McGregor Gow &*

*Co.*, [1892] A.C. 25. Singer was not responsible for anything done in Local 112 in Windsor. The guild had no branches. Local 112 was not a branch of the guild. There was nothing criminal in the Dominion Chamber of Credits. Section 29 of the Trade Unions Act, R.S.C. 1927, ch. 202, declares that a member of a trade union shall not be liable to criminal prosecution for conspiracy or otherwise merely because the purposes of the Trade Unions are in restraint of trade. The words "or otherwise" were important. Neither the Combines Investigations Act nor sec. 498 of the Criminal Code applies to the acts of members of trade unions done in restraint of trade but in the execution of the purposes of trade unions: Halsbury's Laws of England, vol. 27, pp. 602, 615; *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; *Joseph Evans & Co. Ltd. v. Heathcote*, [1918] 1 K.B. 418. Singer should not have been found guilty on any of the counts of the indictment, because the statutes upon which the convictions were procured do not authorise multiple convictions. Several crimes were charged in one count. To constitute an offence against sec. 498, subsec. 1(b), of the Criminal Code, the conspiracy must be to do an unlawful act—an act unlawful by statute. What might be a conspiracy at common law is not what is charged, but an infraction of a specific section of a statute: *Rex v. Clarke* (No. 2) (1908), 14 Can. Crim. Cas. 57. The indictment was insufficient to sustain the conviction, and a motion to quash was refused by the learned trial Judge: *Rex v. Bainbridge* (1918), 42 O.L.R. 203; *Rex v. Quinn* (1918), 43 O.L.R. 385; *Rex v. Loftus* (1926), 59 O.L.R. 65; *Rex v. Molloy*, [1921] 2 K.B. 364.

*D. L. McCarthy*, K.C., and *J. C. McRuer*, K.C., for the Crown, contended that the findings of fact upon which the learned trial Judge had based the conviction of the accused were correct. Each was a party to a combine within the meaning of the Combines Investigations Act, and, being so, entered into a conspiracy to do unlawful acts in restraint of trade as defined by sec. 496 of the Criminal Code. The Amalgamated Builders Council was merely a cloak to hide the operations of the Canadian Plumbing and Heating Guild. There was no real distinction between the guild and the A.B.C. Every member of one was a member of the other. The A.B.C. was a mere device to get legal protection for the guild under sec. 497 of the Criminal Code. The guild was the real organisation. The evidence shewed that the combine operated to the detri-

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ment of the public; that there were price-fixing, price-enhancing, monopoly, and limiting of facilities for supplying or dealing in plumbing and heating supplies: *Gozney v. Bristol, &c., Trade and Provident Society*, [1909] 1 K.B. 901. As to the defence based on sec. 29 of the Trade Unions Act, this only protected the purposes of the Unions. This section did not protect unlawful acts of men merely because these men happened to be members of a trade union: Halsbury's Laws of England, vol. 27, p. 622, note (r). The indictments were properly framed, and were unimpeachable: *Attorney-General for Ontario v. Canadian Wholesale Grocers Association*, 53 O.L.R. 627. Belyea and Weinraub should have been convicted as a matter of law. These accused, having worked out the plan of the combination and conspiracy charged, and engaged Singer to put it into operation, were in law parties to the offences charged in the indictments, even though they may not have been proved to have been guilty of subsequent overt acts, these being merely evidence of the conspiracy.

*O'Connor*, K.C., in reply, contended that as to Belyea and Weinraub, an appeal only lay on a question of law. The finding of the learned trial Judge that neither Belyea nor Weinraub was guilty of the illegal acts for which Singer, Paddon, and Ward were condemned, was not appealable. These accused, Belyea and Weinraub, were guiltless, as found.

June 26. The judgment of the Court was read by LATCHFORD, C.J.:—The first of these appeals, which were argued together, is against the conviction by Mr. Justice Wright on the 23rd March, 1931, of Louis M. Singer, Charles E. Paddon, and Herbert Ward, of offences against the Combines Investigation Act, R.S.C. 1927, ch. 26, and of conspiracy contrary to the provisions of sec. 498 of the Criminal Code.

Singer was condemned to pay fines amounting to \$8,000, or in default to suffer imprisonment, and Paddon and Ward were fined \$400 each. Their appeals are by leave against the sentences as well as the convictions.

Three other persons accused of the same offences, W. F. O'Connor, Roy E. Belyea, and Harry Weinraub, similarly accused, were found not guilty. It is against the acquittal of Belyea and Weinraub that the second appeal has been taken by the Attorney-General under the provisions of the Dominion Act of 1930, 20 & 21 Geo. V. ch. 11, sec. 28, amending the Criminal Code by sub-

stituting new subsections for subsecs. 4 and 5 of sec. 1013 of the Code.

The substance of the indictments and the facts adduced in evidence are, I think, stated accurately, and with sufficient fullness in the reasons for the judgment of the learned trial Judge, and need not be repeated.

In opening his appeal Mr. O'Connor candidly admitted that, if the facts were as found, the conclusions arrived at were justified, but the facts, he ably argued, were quite otherwise.

From the most careful consideration possible of the arguments presented in the first appeal, and of all the evidence, we are not only unable to dissent from the conclusions of Mr. Justice Wright as to the guilt of Singer, Paddon, and Ward, of the offences charged against them, but we agree in his conclusions. Each of the accused was a party or privy to or knowingly assisted in the formation of a combine within the meaning of the Act of 1927. Such actions on their part established that they had entered into a conspiracy to do or cause to be done unlawful acts in restraint of trade as defined by sec. 496 of the Code.

The organisation and registration by the accused of the Amalgamated Builders Council as a trade union was an attempt to cloak the operations of the Canadian Plumbing and Heating Guild, under the protection of sec. 497 of the Code.

What was in appearance a real trade union and registration under the Trade Unions Act, distinct from the guild, was, in fact, a mere sham, and the operations of the A.B.C., as it was called, were throughout those of the guild itself, and always subject to the absolute control and direction of Singer, who was paid an annual salary of \$15,000 from the ample revenues obtained or levied from its members by the guild. The evidence of Mr. Singer himself is conclusive on conditions and other matters relevant to the convictions.

We can see no ground for interference by this Court, and are of the opinion that the appeals of Singer, Paddon, and Ward should be dismissed.

As to the second appeal, it may be said that it is limited to matters which involve only questions of law.

Mr. O'Connor argued that there are questions of fact involved in the appeal. In that view we cannot agree. Without saying that it is a rule of universal application, we are content to accept, as the test whether this is a pure question of law, the statement

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that, if it would have been the duty of the Judge, were the matter to be tried by a jury, to instruct them that if they found the facts as they were in this case found by him, and admitted by the defendants themselves, it was proper for them to convict. This is the test suggested by the counsel for Belyea and Weinraub, and we accept it as satisfactory.

Had the case been tried by a jury, and the facts made to appear as they were at this trial, and indeed as admitted by the respondents themselves, it would have been the duty of the presiding Judge to instruct the jury that they should convict.

That these respondents took an active part in the original scheme—the conspiracy which formed the basis for the prosecution—is admitted; the error in law into which the learned Judge fell was in not distinguishing between the conspiracy itself and overt acts which, while not themselves the conspiracy, were evidence of the existence of the conspiracy. Because these respondents were not proved to have taken part in these subsequent overt acts, the learned Judge acquitted them, saying of one of the respondents, “There is no evidence that connects him with any of the illegal operations.”

We are of opinion that the appeal of the Crown must succeed. Belyea and Weinraub were most active in carrying out the projects of the conspiracy; were originally united with Singer himself in the conspiracy of which the latter was found guilty. They should have been convicted as were Singer, Paddon, and Ward. Their part in the illegal acts was much greater than that of Paddon and Ward, but less than that of Singer.

Finding Belyea and Weinraub guilty on the same counts as Singer was found guilty upon by Mr. Justice Wright, the Court, after careful consideration, has fixed their fines at one-half of those imposed on Singer. Each is condemned to pay a fine of \$2,000 for infraction of the Combines Act and \$2,000 for conspiracy, or \$4,000 in all. In default of payment of \$2,000 in each case, imprisonment is imposed for a period of four months—to run concurrently.

A word may be added. In regard to the form of the indictments, they follow the statutes under which they are laid, and their form is sanctioned by secs. 852, 954, and 1010(2) of the Code.

*Defendants' appeals dismissed and Crown's  
appeals allowed.*

## [APPELLATE DIVISION.]

REX V. PIMMETT.

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June 26.

*Criminal Law—Magistrate's Conviction of Defendant for Wilfully Cutting down a Telephone Pole on his own Land—Criminal Code, sec. 521 (a)—Language of, not Followed in Conviction—Colour of Right—Limitations Act, sec. 38—Trespasser—Belief of Defendant that he had a Right to Abate Nuisance—Conviction Quashed.*

Section 521 (a) of the Criminal Code makes it an indictable offence to destroy, remove, or damage "anything which forms part of or is used or employed in or about any electric or magnetic telegraph, electric light, telephone or fire-alarm."

The defendant was convicted for that he wilfully did, without legal justification or excuse, and without colour of right, unlawfully commit damage by cutting down a telephone-pole belonging to a telephone company.

A telephone line to a summer hotel was erected many years ago across the defendant's property. It was never used for more than a few months in summer, and for years it was not used at all. No easement for the extension of the wires over the defendant's lands existed (Limitations Act, R.S.O. 1927, ch. 106, sec. 38); and it did not appear that the telephone company acquired any right to use the line. So far as was established in evidence, the pole was a nuisance to the defendant, and he acted in what he thought was the exercise of a right when he cut it down:—

*Held*, that he had good grounds for supposing that he had a right to abate what was to him a nuisance on his own land: according to the evidence, the telephone company was a mere trespasser there.

*Regina v. Davy* (1900), 27 A.R. 508, distinguished.

For that reason, and also because the conviction did not follow sec. 521 (a), the words "without legal justification or excuse, and without colour of right," appearing in both information and conviction, the latter should be quashed.

APPEAL by William Pimmett from a conviction made on the 18th April, 1931, by W. H. Floyd, Police Magistrate for the Town of Cobourg and the United Counties of Northumberland and Durham, whereby Pimmett was found guilty on a charge made against him by a provincial constable, in an information which, as sworn, and after amendment re-sworn, was as follows:—

"That William Pimmett on the 27th day of March, in the year of our Lord one thousand nine hundred and thirty-one, at the Township of South Monaghan in the said United Counties, wilfully did, without legal justification or excuse, and without colour of right, unlawfully commit damage by cutting down a telephone pole belonging to the South Monaghan Telephone Company, which said pole formed part of and was used and employed in and about and in the working of the telephone line of the said South Monaghan Telephone Company, contrary to section 521 (a) of the Criminal Code."

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May 28. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

*G. N. Gordon*, K.C., for the appellant, argued that the telephone company did not own the pole. The accused looked upon the pole as a nuisance and thought he had a right to cut it down. The company was a trespasser on his land. Section 521(a) of the Criminal Code, under which the conviction was made, must be read with sec. 38 of the Limitations Act, R.S.O. 1927, ch. 106. The company had no easement over Pimmett's lands. Reference to *Regina v. Matthews and Twigg* (1876), 14 Cox C.C. 5.

*W. B. Common*, for the Crown, contended that the accused took the wrong mode of protecting his rights. He had a civil remedy by action against the company, but he had no colour of right to cut down the pole. He never thought he had a legal right to do this: *Regina v. Davy* (1900), 27 A.R. 508, 4 Can. Crim. Cas. 28; *Regina v. Clemens*, [1898] 1 Q.B. 556.

June 26. The judgment of the Court was read by LATCHFORD, C.J.:—The conviction, in describing the offence, follows the information literally and adjudges the said “William Pimmett for his said offence to forfeit and pay the sum of \$25; also to pay the cost of the destruction of the property amounting to \$47.95, to be paid and applied according to law, and also to pay to W. H. Floyd, Esquire, the sum of \$43.85 for his costs in this behalf.” In default of payment, Pimmett was sentenced to be imprisoned for a period of 30 days.

Section 521(a) of the Code is as follows:—

“Every one is guilty of an indictable offence and liable to two years’ imprisonment who wilfully

(a) destroys, removes or damages anything which forms part of, or is used or employed in or about any electric or magnetic telegraph, electric light, telephone or fire-alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes.”

It will be observed that the information and conviction do not follow sec. 521(a) but insert after “wilfully did” the words “without legal justification or excuse, and without colour of right.”

The evidence discloses that a telephone line to a summer hotel was erected many years ago across Pimmett's property. It was never used for more than a few months in summer, and for years it was not used at all.

No easement for the extension of the wires over Pimmett's lands existed: Limitations Act, R.S.O. 1927, ch. 106, sec. 38;\* and it did not appear that the South Monaghan Telephone Company acquired any right to use the line. So far as was established in evidence, the poles were a nuisance to Pimmett, and he undoubtedly acted in what he thought was the exercise of a right when he cut down the pole. If the words to which I have referred had not been inserted in the information and conviction, I should have very grave doubt that the colour of right under which the accused assumed to act would have been either justification or excuse for his conduct, but in the circumstances I am satisfied there should not have been a conviction, and this for an additional reason—that sec. 521(a) was not followed.

Unlike the appellants in *Regina v. Davey*, 27 A.R. 508, Pimmett had good grounds for supposing that he had a right to abate what was to him a nuisance on his own land.

The conviction should therefore be quashed. I would suggest, however, that if the re-establishment and maintenance of the line, even for a few months in the summer, is to be of any importance, the South Monaghan Telephone Company should take such steps as would warrant its use of the Pimmett property. At present, according to the evidence, it is a mere trespasser there.

*Conviction quashed.*

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[APPELLATE DIVISION.]

COUPLAND V. MARR.

1931.

June 26.

*Negligence—Motor-vehicles upon Highway—Collision—Separate Actions by Husband and Wife for Injuries Sustained—Husband Admitted as Defendant in Wife's Action—Negligence Act, 1930, sec. 6—Married Women's Property Act, sec. 7—Findings of Trial Judge—Reversal of—Dismissal of Actions—Costs—Notice of Appeal—Rule 491 (2).*

J. C., his wife, and others were proceeding in his automobile upon a highway, when a collision occurred with M.'s automobile driven by himself. J. C. and his wife each brought an action against M., whereupon he caused J. C. to be made a party defendant in his

\* 38. No easement in respect of wire or cables attached to property or buildings or passing through or carried over such property or buildings shall be deemed to have been acquired or shall hereafter be acquired by prescription or otherwise than by grant from the owner of such property or buildings.

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wife's action, under the provisions of the Negligence Act, 1930, 20 Geo. V. ch. 27, sec. 6. The trial Judge found that each driver was equally at fault; that J. C.'s wife had no opportunity to do anything that would have avoided the collision, and that no fault could be attached to her; and he directed that judgment should be entered for J. C. for one-half of the full amount of his claim and costs, and that in the wife's action she should have judgment for the full amount of her claim and costs; each defendant to have the right to indemnity over against the other for one-half of claim and costs in case either was called upon to pay the whole amount. The trial Judge did not determine the relative credit to be given to the evidence of the witnesses on either side. If the evidence of the witnesses for the plaintiffs was to be believed, there was no negligence on the part of their driver; while the evidence of the defendant's witnesses, if believed, made it clear that there was none on his part:—

*Held*, that, as the trial Judge could not say which witnesses were telling the truth, nor could this Court, the plaintiffs had not proved their case, and the defendant M. was entitled to a dismissal of the actions.

His appeal should be allowed, but by reason of defects in his material and his disregard of the Rules, the allowance should be without costs—he should have his costs of the actions in the Court below throughout.

The husband's appeal in the wife's action should be allowed—she could not succeed against him on such a tort: Married Women's Property Act, R.S.O. 1927, ch. 182, sec. 7; and no negligence was proved against him. There should be no costs as between husband and wife throughout.

M.'s notice of appeal stated as the grounds of appeal only that the judgment was against the law, the evidence and the weight of evidence, and such further grounds as counsel may advise:—

*Held*, not a compliance with Rule 491 (2), which must in future be followed.

APPEALS by the defendant Marr and cross-appeals by the plaintiff Joseph Coupland in two actions from a judgment of the County Court of the County of Simcoe (WISMER, Co.C.J.), awarding the plaintiffs \$137.35 damages for injuries suffered in a collision of motor-vehicles upon a highway.

June 8. The appeals were heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

*T. N. Phelan*, K.C., for the defendant Marr, argued that there was no finding of fact upon which to base a judgment against him. The plaintiffs failed to prove any negligence. All the evidence was consistent with pure accident.

*F. Hammond*, for the plaintiff Joseph Coupland, contended that a wife could not succeed against her husband in tort: *Ralston v. Ralston*, [1930] 2 K.B. 238; *Gottliffe v. Edelston*, [1930] 2 K.B. 378; *Goldman v. Goldman* (1928), 61 O.L.R. 657. The negligence of the defendant Marr caused the accident.

*D. F. MacLaren*, for the plaintiff Edith Coupland, contended that the defendant Marr's negligence was responsible for the accident.

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June 26. The judgment of the Court was read by RIDDELL, J.A.:—Joseph Coupland, his wife, Edith Coupland, and others were proceeding in his automobile, when a collision occurred with that of the defendant driven by him. Each of the two, Joseph and Edith Coupland, brought an action against Marr, whereupon in the wife's action he had the husband made a party defendant under the provisions of the recent statute, the Negligence Act, 1930, 20 Geo. V. ch. 27, sec. 6.\*

The cases were tried together before his Honour Judge Wismer, of the County Court of the County of Simcoe, without a jury. The learned trial Judge has the following in his reasons for judgment:—

"I find that each driver was equally at fault and the damages should be borne accordingly. I also find that the plaintiff Edith Coupland had no opportunity to do anything that would have avoided the collision and that in the circumstances no fault could be attached to her.

"There should be judgment for the plaintiff Joseph Coupland for one-half of the full amount of his claim and costs, which amount is abundantly supported by the evidence, and in the Edith Coupland action she should have judgment for the full amount of her claim and costs, each defendant to have the right to indemnity over against the other for one-half of claim and costs in case either one is called upon to pay the whole of the amount."

Judgment was entered up accordingly—that in the wife's action being for payment by both defendants with a provision as in the written reasons. The defendant Marr appeals on the following grounds as stated in his notice of appeal:—

"(1) That the said judgment is against the law, the evidence and the weight of evidence.

"(2) And on such further and other grounds as counsel may advise."

\* 6. Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as may be deemed just.

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This is not a compliance with Rule 491(2),\* as we have more than once declared; and on that ground alone we might have dismissed the appeal. But we decided, possibly for the last time, to proceed with the appeal and hear what could be urged for this defendant. The husband also appealed from the judgment in the wife's case; this also was very irregular, but we proceeded with it as well.

We are always very loath to interfere with the findings of a trial Judge, but in the present case there are really no findings or anything else but the merest conjecture.

The learned Judge says:—

“The plaintiffs and defendant and their witnesses appear to be very respectable people and did not colour their evidence, but seemed to be fair and conscientious in their statements, and I could not say there was anything to indicate that any one was more entitled to be believed than the others.”

And we are in a less favourable position to determine the relative credit to be given to the evidence of the witnesses.

If the evidence of the witnesses for the plaintiffs is to be believed, there was no negligence on the part of their driver; while that of those of the defendant, if believed, makes it quite clear that there was none on the part of theirs. The learned Judge could not say which set were stating the fact; nor can we. *Potior est conditio defendantis*: the plaintiff must prove his case, the defendant is not called upon to disprove it; and, in the absence of the necessary proof, the defendant is entitled to a dismissal of the actions.

It is a cardinal principle that a Judge must not guess, he must adjudicate, and that upon evidence. It is, indeed, in some instances said that a particular judgment is not much more than a guess, but in every case it must be something more than a guess, and in every case based upon evidence. In the present case there is no evidence upon which a finding of negligence can be supported as against either driver.

In the result, the actions should have been dismissed as against Marr; his appeal must be allowed, but, by reason of the defects in his material and his total disregard of the Rules, the allowance

\* 491.—(2) The notice shall state the nature of the relief asked and shall set forth the grounds of appeal, and no other grounds may be argued save by leave of the Court.

will be without costs; he should have his costs of the actions in the court below throughout.

In the husband's appeal in the wife's action, in no case could the judgment stand: she cannot succeed against him on such a tort: Married Women's Property Act, R.S.O. 1927, ch. 182, sec. 7; *Goldman v. Goldman*, 61 O.L.R. 657; *Ralston v. Ralston*, [1930] 2 K.B. 238; *Gottliffe v. Edelston*, [1930] 2 K.B. 378, which last named case contains a very interesting and instructive discussion of the rights *inter se* of husband and wife. Moreover, no negligence is proved against him.

There should be no costs as between husband and wife throughout.

It would seem necessary to give express warning as to the necessity of following the Rule as to notices of appeal to this Court, in which respect many of the profession seem to be strangely negligent.

It is said that an appeal was taken by the wife to increase damages; if so, it was not proceeded with, and will be dismissed without costs.

*Defendants' appeal allowed; cross-appeal dismissed.*

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[APPELLATE DIVISION.]

RE JOHNSTON AND LITTLE.

1931.

*Landlord and Tenant—Lease—Provision for Determination of Tenancy by “Months’ Notice”—Two Months’ Notice Given.*

June 26.

A lease of land for 5 years contained a provision that the tenancy might be determined at the end of any year by either of the parties giving to the other at least “months’ notice” in writing of his intention to determine at the end of the then current year:—

*Held*, that two months’ notice terminated the tenancy.

*Re Hornberger and Gray* (1922), 22 O.W.N. 176, and *Re Dempsey and Midland Loan and Savings Co.* (1925), 57 O.L.R. 627, approved.

AN appeal by a landlord from an order of the Judge of the District Court of the District of Rainy River refusing a summary application for an order for possession of the demised premises, under the overholding tenants’ sections of the Landlord and Tenant Act, R.S.O. 1927, ch. 190.

June 9. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

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*F. C. Forster*, for the appellant, argued that he had given "months' notice," as required by the lease, when he had given more than two months' notice, and that, when this was shewn to the learned District Court Judge, an order for possession should have been awarded to the landlord. On the interpretation to be placed on such language as is here in question, counsel referred to *Re Hornberger and Gray* (1922), 22 O.W.N. 176; *Re Dempsey and Midland Loan and Savings Co.* (1925), 57 O.L.R. 627; *Mathewson v. Beatty* (1907), 15 O.L.R. 557.

No one appeared for the tenant, respondent.

June 26. LATCHFORD, C.J.:—This appeal is from the judgment of his Honour Allan McLennan, Esquire, Judge of the Rainy River District Court, dated the 17th January, 1931, in proceedings under the sections of the Landlord and Tenant Act, R.S.O. 1927, ch. 190, respecting overholding tenants.

The lease under which the tenancy arose was for five years, terminable on either party giving to the other "months' notice" in writing of his intention to determine the lease at the end of the then current year.

More than two months' notice in writing of the intention of the landlord to end the term at the end of a particular year was given by the landlord to the tenant, but the tenant neglected or refused, at the end of the year, to go out of possession.

On the application to the District Court Judge under Part III. of the Act, it was held that the provision as to notice was too indefinite, and the application was dismissed.

In my opinion, the notice may properly be regarded as in strict conformity with the provision in the lease. The rule of construction in such cases is laid down by Elphinstone, *Interpretation of Deeds*, p. 47:—

"When the words used in a deed are in their primary meanings unambiguous, and when such meanings are not excluded by the context, and are sensible with respect to the circumstances of the parties at the time of executing the deed, such primary meanings must be taken to be those in which the parties used the words."

The word "months" in the lease is not ambiguous, and has a meaning not excluded by anything in the context. It is sensible with respect to the circumstances in which it was used by the parties—equally available to either the landlord or the tenant.

There is a definite primary meaning to the word, when used as here, with an unfilled blank preceding it, that is, two or any greater number of months, and, on the rule of construction quoted, that meaning must, in this case, be given to it. So considered, effect is given to what was manifestly the intention of the parties.

I had occasion to consider the point in question here in *Re Hornberger and Gray*, 22 O.W.N. 176, where I decided that two or any greater number of months fulfilled the requirement of “ months’ notice.”

The appeal should be allowed with costs, and the judgment below set aside with costs, and an order made for possession by the landlord of the property in dispute.

RIDDELL, J.A.:—In and by an indenture of lease, dated the 28th January, 1928, the appellant let to the respondent certain lands in the township of Lash, in the District of Rainy River, for five years from the end of February of that year. The indenture contained the following covenant:—

“And it is hereby further agreed by and between the parties hereto that notwithstanding anything hereinbefore contained the tenancy hereby created may be terminated at the end of any year thereof by either of the said parties giving to the other of them at least            months’ notice in writing of his intention to determine the same at the end of the then current year.”

The original indenture examined by us does not indicate that the omission of the number of months was accidental; while on the printed form some of the printed provisions are carefully cancelled, and some provisions are inserted in typewriting. Nor is there anything in the circumstances to indicate that any effect was to be given to the words of the covenant quoted, at all different from their *primâ facie* meaning—while it might be considered unreasonable that the landlord should have the power to evict the tenant after the fall-ploughing, not permitting him to have any advantage from his labour, that seems to be displaced by the fact that the tenant had the power of abandoning the farm when it might well be too late for the landlord to get a new tenant. I can find nothing to oust the ordinary interpretation of the words, as shewn in the cases.

As is said in a similar case by my Lord (then Latchford, J.), in *Re Hornberger and Gray*, 22 O.W.N. 176, at p. 177:—

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"The blank before the word 'months' did not render the proviso inoperative. It was plain that any number of months more than one would satisfy the only requirement imposed. Two months' default would have been sufficient."

In *Re Dempsey and Midland Loan and Savings Co.*, 57 O.L.R. 627, Grant, J., comes to the conclusion, which I think is sound law, that where a blank is left in a printed proviso in a mortgage but the proviso is not struck out, the Court will give effect to its meaning, if capable of any meaning at all, without availing itself of extrinsic evidence as to the intention of the parties; it is unnecessary to compare this statement with that in *Mathewson v. Beatty*, 15 O.L.R. 557, as it cannot be said that the time which is to be deduced from the document itself, interpreted as I think it should be, is not a reasonable time.

I am of opinion that either party had the right to give two months' notice and so terminate the term. Such notice was given by the landlord, and the judgment below refusing him relief should be reversed, with costs throughout.

MASTEN, ORDE, and FISHER, JJ.A., agreed with LATCHFORD, C.J., and RIDDELL, J.A.

*Appeal allowed.*

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[APPELLATE DIVISION.]

[IN BANKRUPTCY.]

1931.

June 26.

RE THOMPSON.

*Bankruptcy—Claim of Bank to Rank against Estate of Bankrupt—Promissory Note—Collateral Security—Alteration of Note by Bank—Novation—Surrender of Securities to Prejudice of Joint Maker of Note—Bills of Exchange Act, sec. 176 (3)—Mercantile Law Amendment Act, sec. 2.*

On the 28th September, 1928, a promissory note for \$26,000 was made by T. and R. in favour of the Bank of D., payable 120 days after date. The instrument recited that the makers had pledged with the bank, as collateral security for the payment of the note and any other liabilities of the makers, certain shares in companies and a savings withdrawal account of \$10,000, which property and any substituted property the holder of the note was authorised to sell. T. made an assignment in bankruptcy on the 6th December, 1928; and the bank claimed to rank upon the bankrupt estate of T. in respect of the note for a balance of \$24,190.83. This claim was disallowed by the trustee, and upon an issue directed to be tried be-

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tween the bank and the trustee to determine whether the trustee's disallowance should be set aside or varied, and, if set aside or varied, to determine the amount, if any, for which the bank should rank in respect of the note. Upon the trial of this issue it was found that the bank should rank as a creditor of the estate of T. for \$11,889.93. The trustee appealed against this finding, and the bank cross-appealed, claiming to rank for \$23,779.26. The trustee contended: (1) that the bank had materially altered the note and so had avoided it; (2) that there had been a novation whereby R. became the sole debtor to the bank and T. had been released; (3) that the bank had surrendered to R. certain of the securities which R. had pledged to the bank, to the prejudice of T., who as a co-debtor might be entitled to the benefit thereof in support of his right to contribution.

*Held*, upon the evidence, that the original joint note of T. and R. was given by them for a loan of \$26,000 made to them by the bank; that they were each liable for the repayment of the loan, so that the bank could always rely upon the consideration for the note as a foundation for an action to recover the money due to it.

An alteration by the payee of a note, though it avoids the instrument, does not extinguish the debt.

The inclusion of the pledge in the note did not of itself invalidate the note: Bills of Exchange Act, R.S.C. 1927, ch. 16, sec. 176 (3).

The alleged alteration consisted in the striking out of some of the items setting forth the securities, in consequence of their surrender by the bank. There was no alteration in that part of the document which embodied the essential requirements of a promissory note, and it was doubtful whether the provisions of the Act applied to the alterations complained of at all; nor could merely running the pen through such items as referred to securities no longer held be considered an alteration materially affecting the liability upon the note itself.

(2) There was no novation when the bank took the new note from R. and renewed it from time to time, retaining the joint note; the bank never released T. either expressly or by implication, but was careful by retention of the joint note to keep his liability alive.

(3) Nor could the trustee succeed upon the ground that the bank relinquished to R. some of the pledged securities which belonged to him; R. and T. were both principals, and there was no change in their relationships whereby, even as between themselves, R. became the principal and T. the surety; in the absence of some express stipulation in the contract itself, no principle of law or equity precludes a creditor to whom two or more are liable as principals from giving up to the owner any security he holds. There is nothing in the Mercantile Law Amendment Act, R.S.O. 1927, ch. 161, to compel a creditor to retain the pledged securities for the benefit of either of the joint debtors.

Upon the bank's cross-appeal, *held*, that, as it could recover a judgment against T., if solvent, for the full amount due on the note, it was entitled to rank for and be paid a dividend upon the full amount.

An issue directed by an order of WRIGHT, J., to be tried, to determine whether the Bank of Detroit was entitled to rank as a creditor of the estate of Edward Blake Thompson, in bankruptcy, and, if at all, to what extent.

The issue was tried before GARROW, J., without a jury, at a Toronto sittings.

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*P. C. Finlay*, for the Bank of Detroit, the plaintiff in the issue.  
*Lewis Duncan* and *C. Harold Kemp*, for R. R. Grant, trustee in bankruptcy of the property of Thompson, the defendant in the issue.

March 14. GARROW, J.:—Edward Blake Thompson made an authorised assignment in bankruptcy on the 3rd December, 1928. Prior to that date, namely, on the 28th September, 1928, the said Thompson and S. C. Robinson had made in favour of the plaintiff bank a joint promissory note, payable 120 days after date, for \$26,000, with interest prior to maturity at 6 per cent. per annum and thereafter at 7 per cent.

This note, which was a renewal of an earlier one, is not only a promise to pay, but contains as well, in the body of the document, an agreement respecting certain securities pledged with the bank "as collateral security for the payment of this note," and the securities are set out in detail. All this collateral security belonged to Robinson except the half-interest of Thompson in the shares of the Dominion Chocolate Company.

The note in question fell due on the 28th January, 1929, nearly two months after Thompson's authorised assignment. On the 6th December, 1928, four days after the assignment, Robinson wrote the bank saying, "I will assume full responsibility for payment of the note," and on or about the due date of the note in question Robinson did attend at the bank and make a new note in his own name for \$26,000. Prior to this, namely, on the 5th January, 1929, Robinson had procured the bank to give up to him the Trusts and Guarantee Company stock and also to discharge from the collateral pledge a savings bank account of his in the sum of \$10,000, both of which had formed part of the securities originally pledged, and the note or agreement was altered at this time by striking out of the document the words describing these securities.

The note in question was not delivered up to Robinson upon his giving the new note, although he says that he assumed from what took place that it would be sent to him, and that it was not to be held by the bank as collateral to the new note. It was, however, so retained by the bank. The new note has been renewed from time to time and in each case apparently the old note has

been stamped "paid" and delivered to Robinson, except the note in question.

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Robinson filed a claim with the assignee on or about the 17th December, 1928, in which he claimed among other things as follows: "That the said E. B. Thompson was . . . and still is justly and truly indebted to the Bank of Detroit in respect of a certain promissory note made by him and me, this declarant, to the said Bank of Detroit on which there is owing the sum of \$26,000 and interest . . . less the sum of \$2,220.74, which is standing to our credit in the said bank." This claim was evidently made not on Robinson's behalf but on that of the bank, and it was disallowed by the trustee on that ground.

Subsequently, on the 2nd April, 1929, there was filed on Robinson's behalf a claim, which is stated as follows: "The said Sidney C. Robinson is justly and truly contingently liable to the said Bank of Detroit on behalf of the said Edward Blake Thompson in the sum of \$13,000 together with interest thereon under the said note. The said Sidney C. Robinson has a valid contingent claim against the estate of the said Edward Blake Thompson for any sum he may have to pay to the said Bank of Detroit on behalf of the said Edward Blake Thompson."

Between the dates of the two claims made by Robinson, namely on the 8th March, 1929, the plaintiff bank filed its claim seeking to rank as a creditor in the sum of \$26,658.14 in respect of the note in question. By subsequent amended proof, filed on the 13th May, the total claimed was reduced to \$24,437.40, by reason of a credit of the difference being the amount of a certain\* joint account standing to the credit of Thompson and Robinson in the books of the bank.

The trustee disputes the claim of the bank to rank, upon several grounds, viz.: that the note has been paid and discharged; that it has been materially altered by striking out the two securities mentioned, and that Thompson's position was prejudiced by the giving up to Robinson of these securities; that the claim in any event is made not on behalf of the bank but on Robinson's behalf; and that, at the utmost, neither Robinson nor the bank is entitled to rank for more than one-half the amount of the total indebtedness.

It being understood that Robinson and the bank are not both

Garrow, J. entitled to rank, the defences raised, except as to the amount of the claim, appear to me to be largely academic.

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THOMPSON. It may well be that the alteration made was a material alteration (see *Maxon v. Irwin* (1907), 15 O.L.R. 81); and also that, if Thompson had paid the note himself, he would have been entitled to receive all the collateral, even though it belonged to Robinson, to enable him to enforce as against the latter payment of his just proportion of the debt. (See *Duncan Fox & Co. v. North and South Wales Bank* (1880), 6 App. Cas. 1, at p. 19). There is also room for the argument that the note was in fact paid and satisfied when Robinson gave the new note, and this notwithstanding the fact that the bank, contrary to its practice in all other like instances, retained this note and entered it on the collateral "cards" as part of the security held for Robinson's subsequent notes.

But Robinson, who was called as a witness on behalf of the plaintiff bank, seems thoroughly to acquiesce in the claim being made by the bank and not by himself; and, that being so, it appears to me that the only real question is, for what amount should the claim be made? because I am of the opinion that, as between Robinson and Thompson, the alteration of the document and the delivery up of the securities would not prevent Robinson from asserting as against Thompson that to the extent of one-half of the total he has paid or satisfied Thompson's debt.

As to the amount, I think it is clear that the bank can stand in no better position than Robinson could in respect of the note in question. What did it (the old note) in fact represent when the new note was given by Robinson, the bank retaining the old one? It represented Robinson's right to rank against the insolvent estate for one-half of the debt and nothing more, in my view, as indeed Robinson appears to recognise by his second proof of claim. If it were otherwise, and the bank was entitled to rank for the full amount, and the estate should, unexpectedly, become worth one hundred cents in the dollar, Robinson would succeed in this manner in having the whole debt paid in full by the Thompson estate, although he is admittedly liable himself for half of it as between himself and Thompson. Or, from another point of view, suppose the bank's claim stands and the estate should pay fifty cents in the dollar, all Thompson's creditors must be content with half the amount of their just claims, but Robinson gets the benefit of having the bank apply on his indebtedness to the bank one hundred

per cent. of all he could compel Thompson to pay were he perfectly solvent, and he gets this at the expense of the other creditors of Thompson.

There are, no doubt, many points of legal nicety arising out of the transactions in question here, but the substance of the matter, as it appears to me, is as I have indicated.

I would therefore find that the bank's claim should be limited to one-half the amount represented by the note in question less the credit of \$2,220.14.

The trustee is entitled to his costs of the proceedings throughout as between party and party, and not, as suggested, as between solicitor and client.

Before endorsing the record I desire to be satisfied as to the precise position of the trustee in regard to Robinson's claim. I am assuming that this claim will now be withdrawn, or, if not, that the trustee is still in a position to dispute it *in toto* in view of the present finding. Certainly both Robinson's claim and the bank's should not stand.

The trustee in bankruptcy appealed and the Bank of Detroit cross-appealed from the judgment of GARROW, J.

June 18. The appeal and cross-appeal were heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, JJ.A.

The argument is sufficiently set forth in the reasons for judgment.

*Duncan*, for the trustee, referred to the Mercantile Law Amendment Act, R.S.O. 1927, ch. 161, sec. 2; Leake on Contracts, 7th ed., pp. 603, 604, 605; Chalmers on Bills of Exchange, 9th ed., p. 256; Halsbury's Laws of England, vol. 2, p. 557; Byles on Bills, 19th ed., p. 291; *Duncan Fox & Co. v. North and South Wales Bank*, 6 App. Cas. 1.

*Finlay*, for the Bank of Detroit, referred to the *Duncan* case, at p. 11; Chalmers on Bills of Exchange, 9th ed., p. 263.

June 26. RIDDELL, J.A.:—An order was made in Bankruptcy by Mr. Justice Wright on the 3rd April, 1930, for the trial of an issue between the Bank of Detroit and the assignee of Edward Blake Thompson, "wherein the said Bank of Detroit shall be the plaintiff and the said trustee shall be the defendant: and the question to be tried shall be whether the trustee's disallowance of the

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Re varied, to determine the amount, if any, for which the Bank of  
THOMPSON. Detroit should rank as a creditor against the bankrupt's estate on  
Riddell, J.A. a promissory note made by the said bankrupt and one S. C. Robinson, dated the 28th day of September, 1928, for the sum of \$26,000, payable 120 days after date."

Pleadings were delivered, and the matter came on for trial before Mr. Justice Garrow at Sandwich, when it was found "that the plaintiff rank as a creditor of the said estate of E. B. Thompson, carrying on business under the firm name and style of Campbell Thompson and Company," for the sum of \$11,889.93."

The trustee appeals against the decision; and the bank cross-appeals, claiming to rank for \$23,779.26, instead of the amount found.

The facts are that a promissory note was given on the 28th September, 1928, to the bank, signed by E. B. Thompson and S. C. Robinson, and in the following form:—

"Detroit, Mich., September 28, 1928.

\$26,000.00

"One hundred and twenty days after date, for value received, we promise to pay to the order of the Bank of Detroit twenty-six thousand and no/100 dollars at its main office, 241 West Fort Street, with interest at the rate of six per cent. per annum from date of maturity until paid. The undersigned having deposited and pledged with the said bank or the holder hereof, as collateral security for the payment of this note, and any other liabilities, absolute or contingent, present or future, of the undersigned to the said bank or the holder hereof, the following property owned by the undersigned, viz:—

"493 shares Dominion Chocolate Co. pfd.

"10,000 withdrawal account.

"500 shares British American Brewing Co. Ltd.

"200 shares International Petroleum Co.

"190 shares H. Walker Gooderham & Worts.

"100 shares Square (D) (A).

"50 shares ditto.

"which property with any other property hereafter deposited in substitution therefor or in substitution thereof, the holder of this

note . . . is authorised to sell. . . . Address 293 Bay St., Toronto, Ont. App. Div.  
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Of the securities mentioned, the Chocolate stock, then as now worthless, was held by Thompson as trustee, being owned half by Robinson; the remainder of the securities were the property of Robinson. Riddell, J.A.

This note was a renewal of a previous note by the same parties of the 31st May, 1928, for the same amount, secured by

493 Shares Oominion Chocolate Co. Ltd. preferred stock,

70 " Ford Motor Co. of Canada.

10,000 Savs. withdrawal.

500 shares British Amer. Brewing Co. Ltd. Class A.

70 " Trust & Guarantee Co. Ltd.

200 International Petroleum.

The last-named note was itself a renewal of a note by the same parties for the same amount, with the securities, the Chocolate and Ford shares as above; while this again was a renewal of a note for \$28,000 by the same parties with the same securities.

It is not contested that both Thompson and Robinson were liable as debtors upon these notes, no question of principal and surety arising until later.

Thompson made an assignment on the 6th December, 1928; on this coming to the knowledge of Robinson, he wrote the bank with the information, and continuing as follows:—

"I thought it well to advise you of this promptly as he has a joint note with me at your bank for \$26,000.00 for which you have my collateral security.

"Of course I will assume full responsibility for the payment of the note.

"When next in Detroit, I will call to see you, at which time we can talk over what should be done, at the expiration of the note."

Before the note was due, he went to the bank, and made arrangements as to it. This was to give a note for \$26,000 at 4 months, with the same securities except the withdrawal account, which was his own and 70 shares of Trust and Guarantee, also his own. The bank retained the note of the 28th September, as collateral security. as the manager puts it.

App. Div.      The situation seems quite clear—after this the bank expected  
1931.      to be paid by Robinson, but did not release Thompson, continuing  
Re      to hold his note, although it allowed Robinson to take 70 shares  
Thompson.      of Trust and Guarantee and the advantage to be derived from his  
Riddell, J.A. withdrawal account; the note of the 28th January was renewed  
by Robinson on the 28th May, and again on the 25th September,  
for \$26,000. On this note has been credited \$2,327.95, being the  
amount of a credit balance of the joint account of Robinson and  
Thompson in the bank.

In the claim filed against Thompson by the bank, the amount is (by amendment) stated as the balance \$24,190.83.

The bank not having renounced its rights in the note (Bills of Exchange Act, R.S.C. 1927, ch. 16, sec. 142), and having retained the note, it seems to me, on the plainest principles of law, that the transaction was simply to continue the liability of both makers, but to limit the amount to the sum to which the liability should be reduced on the notes taken from Robinson.

Robinson not being a party to these proceedings, we have no concern with the result *quoad* him; the bank is entitled to rank on the bankrupt estate for the amount to which the indebtedness was reduced by the dealings with Robinson; whether Robinson has any claim against the estate or *vice versâ*, we have nothing to do with; the parties must work out their rights in other proceedings as they may be advised; we make no order in that regard, the issue directed being only as to the right of the bank to rank as a creditor of the estate.

There being no relation of principal and surety involved—the bank did not change its position and take Robinson as the real debtor with Thompson as surety; but kept both as debtors—consequently, there was no wrong committed against Thompson in allowing Robinson to withdraw his own property, which he had put up as “collateral.”

I would allow the appeal of the bank with costs, here and below—the amount is a mere matter of computation.

ORDE, J.A.:—The facts are fully set forth in the judgment appealed from and that of my brother Riddell.

The judgment was attacked by the appellant during the argument upon three distinct grounds:—

1. That the bank had materially altered the promissory note upon which its claim is based and so had avoided it.

2. That there had been a novation whereby Robinson became the sole debtor to the bank and Thompson had been released.

3. That the bank had surrendered to Robinson certain of the securities which Robinson had pledged to the bank, to the prejudice of Thompson, who as a co-debtor might be entitled to the benefit thereof in support of his right to contribution.

All of these grounds can be disposed of very shortly.

It was clear from the evidence that the original joint note of Thompson and Robinson was given by them for a loan of \$26,000, made to them by the bank. They were each liable for the repayment of the loan, so that the bank could always rely upon the consideration for the note as the foundation for an action to recover the money due it.

The law is thus stated in Byles on Bills, 9th ed., at p. 291: "An alteration by the drawer and payee of a bill payable to drawer's order, or the payee of a note, though it avoids the instrument, does not extinguish the debt;" and it is not necessary to refer to the authorities there given for the statement. The proposition is elementary. But, as pointed out in the same paragraph in Byles, when an endorsee alters a bill or note his doing so will extinguish the debt as between himself and his immediate endorser, because the destruction of the instrument would deprive the endorser of his rights against the earlier parties.

I am by no means sure that what has been relied on by the appellant as an alteration is really an alteration of the note at all.

The instrument of which the promissory note in question forms part contains certain provisions pledging to the bank as collateral security a number of shares and other securities. The inclusion of this pledge does not of itself invalidate the note, by the express provisions of sec. 176 (3) of the Bills of Exchange Act, R.S.C. 1927, ch. 16. The alleged alterations consist in the striking out of some of the items setting forth the securities, doubtless in consequence of their surrender by the bank. There is no alteration in that part of the document which embodies the essential requirements of a promissory note as such, and I think it is doubtful if the provisions of the Bills of Exchange Act apply to the alterations complained of at all. Nor do I see how merely running the pen through such items as referred to securities no longer held

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1931. upon the note itself, whatever might be the effect of the relinquish-  
RE ment of the securities, which would depend upon other consider-  
THOMPSON. ations altogether.

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Nor was there any novation when the bank took the new note from Robinson and renewed it from time to time, and retained the joint note. It is true that in that part of the renewal note setting forth the securities which Robinson was pledging to the bank, the joint note was included as if it were collateral to Robinson's indebtedness. But it is clear that the bank never released Thompson either expressly or by implication, but on the contrary that it was careful by the retention of the joint note to keep his liability alive.

In my judgment neither the fact that they referred to the joint note as collateral security for Robinson's notes, nor the fact that in the bank's books of entry the indebtedness was treated as primarily that of Robinson, has any bearing upon the real relationship of both Thompson and Robinson as the original and primary debtors to the bank in respect of the moneys originally advanced to them. The bank's book entries are to be regarded really as indicating the current condition of the indebtedness for book-keeping purposes only, and not otherwise.

Nor can the appellant succeed upon the ground that the bank relinquished to Robinson some of the pledged securities which belonged to Robinson. Robinson and Thompson were both principals. Neither was a surety for the other, and there was no change in their relationship whereby, even as between themselves, Robinson became the principal and Thompson the surety. Had there been any such changed relationship, then upon notice to the bank it would have been bound in equity thereafter to deal with the parties and the securities upon the altered footing, upon the equitable principle discussed in *Rouse v. Bradford Banking Co.*, [1894] A.C. 586. There is no case here for the application of any such principle.

Mr. Duncan referred to sec. 2 of the Mercantile Law Amendment Act, R.S.O. 1927, ch. 161. That section entitles one who is liable with another for any debt, upon paying the debt, to an assignment to himself or a trustee for himself, of any securities in the hands of the creditor so that he may rely upon them to secure such indemnity or contribution from his co-contractor or co-debtor as he is justly entitled to, having regard to the relation-

ship between them. This is of course a statutory right, but there is nothing in the Act to compel a creditor to retain the pledged securities for the benefit of either of the joint debtors. I know of no authority for the suggestion that the creditor is in any way so bound or may not without risk to himself surrender to either of the joint debtors a security belonging to that debtor. The surrender to one debtor of the property belonging to the other or belonging to both, without the consent of the other, might make the creditor liable under the law of bailment. But, in the absence of some express stipulation in the contract itself, I know of no principle of law or equity which precludes a creditor to whom two or more are liable as principals from giving up to the owner any security he holds.

The bank cross-appeals, on the ground that it is entitled to rank against Thompson's bankrupt estate for the whole balance due upon the note and not merely for one-half. Upon the argument it was said that this would increase the estate's liability, and it was suggested that Robinson either had filed or might file a claim. But Robinson could have no claim whatever against the estate until he had paid more than his share of the joint debt, presumably, in this case, one-half of it. And, as the bank could recover a judgment against Thompson, if solvent, for the full amount due on the note, it is entitled to rank for and be paid a dividend upon the full amount.

During the course of the proceedings counsel for the bank stated that, in the unlikely event of the dividend exceeding one-half the amount of the note, it would not expect payment of the excess. If Robinson is able to pay his half, then it would not be of much consequence whether the bank took the excess or not, because the estate would be entitled to compel Robinson to recoup the estate by virtue of Thompson's right to contribution from his co-debtor.

The appeal should be dismissed with costs, and the cross-appeal should be allowed, and the bank declared entitled to prove its claim against the estate for the full balance due upon the note, with interest to the date of the authorised assignment, with costs here and below; the costs to be payable by the authorised trustee, with such right to indemnity out of the estate as he is entitled to.

LATCHFORD, C.J., and MASTEN, J.A., agreed with ORDE, J.A.

*Appeal dismissed and cross-appeal allowed.*

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[IN CHAMBERS.]

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REX v. EPSTEIN.

June 29.

*Municipal Corporations — By-law of Township Council Prohibiting Keeping of Miniature Golf-course Open on Sunday — Powers of Council — Municipal Act, sec. 429(2) — Ejusdem Generis Rule — Power to Regulate and License — Valid Exercise of — Powers of Provincial Legislature — Intra Vires.*

The defendant was convicted for operating a miniature golf-course on Sunday, contrary to the provisions of a municipal by-law, expressed to be passed in exercise of the powers conferred upon the council of the municipality by sec. 429 of the Municipal Act, R.S.O. 1927, ch. 233, subsec. 2 of which authorises certain township councils to pass by-laws for regulating and licensing exhibitions held for hire or gain, theatres, music-halls, bowling-alleys, moving picture shows and other places of amusement. By the by-law it was ordered that no person shall, within the limits of the township, carry on the business of a miniature golf-course until he has procured a licence so to do; that a licence-fee shall be paid annually; and that "no person obtaining a licence for a miniature golf-course . . . shall keep his place open . . . or allow any person to play thereon between the hour of 11.45 p.m. and the hour of 8 a.m. on the following day or at any time on Sunday." The by-law contained no definition of a miniature golf-course, and no evidence was adduced as to the precise meaning of the expression; but it was admitted that the defendant was the proprietor of a miniature golf-course; that he had obtained a licence; and that he kept the course open and allowed persons to play thereon upon a certain Sunday. It was argued, on appeal from the conviction, that the passing of the by-law was not within the powers conferred by sec. 429(2), the suggestion, based on the *ejusdem generis* rule, being that a miniature golf-course is not a place of amusement of the class to which the amusements specified in the statute belong:—

*Held*, that, there appearing to be no *genus* to which all of the specified places of amusement belonged and from which the miniature golf-course could be excluded, there was no reason for saying that the miniature golf-course was not one of the places dealt with by the statute; and therefore the by-law was one which the statute conferred authority to pass.

- (2) That the by-law was not beyond the provincial power as prohibitory legislation which in effect treated the acts prohibited as constituting a profanation of the Christian institution of the Lord's Day and declares them punishable as such, but appeared to have been passed with the object of regulating the conduct of the business of miniature golf-courses throughout the week, and of securing to the persons affected a reasonable degree of quiet at the times when naturally they would desire to be undisturbed; and there was no reason for supposing that it was not what it appeared to be, or for imputing to the council any lack of good faith in passing it.

*O'Brien v. Royal George* (1921), 57 D.L.R. 301, approved and followed. *Quimet v. Bazin* (1912), 46 Can. S.C.R., 502, and later cases, distinguished.

AN appeal by the defendant, upon a case stated by a magistrate under sec. 761 of the Criminal Code, against the conviction of the defendant for operating a miniature golf-course on Sunday, contrary to the provisions of a by-law of the Township of York.

The appeal was heard by ROSE, C.J., in Chambers.

*J. L. G. Keogh*, for the defendant.

*Joseph Sedgwick*, for the Crown.

*Howard A. Hall*, for the Corporation of the Township of York.

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June 29. ROSE, C.J.:—Two points are raised, the first being that the power to pass the by-law in question is not one of the powers purported to be conferred upon the council by the Municipal Act, and the second being that the provisions of the by-law are not within the competence of the Provincial Legislature but are in the nature of a criminal law and so fall exclusively within the jurisdiction of Parliament.

The by-law is expressed to be passed in exercise of the powers conferred upon the council by sec. 429 of the Municipal Act. The relevant subsection of that section seems to be subsec. 2, which authorises certain township councils to pass by-laws:—

“For regulating and licensing, subject to the provisions of the Theatres and Cinematographs Act, exhibitions held for hire or gain, theatres, music-halls, bowling alleys, moving picture shows and other places of amusement, and for prohibiting the location of them, or a particular class of them, on land abutting on any highway or part of a highway to be named in the by-law, and for revoking any licence granted.”

But there is a suggestion that power is conferred also by subsec. 4, which authorises the councils to pass by-laws “for regulating and licensing . . . roller-skating rinks and other places of like amusement, and merry-go-rounds, switchback railways, carousals and other like contrivances.”

By the by-law it is ordered that no person shall, within the limits of the township, carry on the business of a miniature golf-course until he has procured a licence so to do; that a licence-fee shall be paid annually; and that “no person obtaining a licence for a miniature golf-course, golf driving course, or similar place of amusement, shall keep his place open, or allow the same to be opened, or allow any person to play thereon between the hours of 11.45 p.m. and the hour of 8 a.m. on the following day or at any time on Sunday.”

The by-law does not contain a definition of a “miniature golf-course,” and no evidence was adduced as to the precise meaning of the expression. But it is admitted that the defendant was the

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proprietor of a miniature golf-course; that he had obtained a licence as required by the by-law; and that he kept the miniature golf-course open and allowed persons to play there on a certain Sunday.

The contention that the passing of the by-law was not within the powers purported to be conferred upon the council by the Municipal Act is based upon the *ejusdem generis* rule, the suggestion being that a miniature golf-course is not a place of amusement of the class to which the amusements specified in the statute belong. There is difficulty, however, in the application of the rule to sec. 429 (2) of the Act. The specified places of amusement are heterogeneous; any class that can include both any exhibition held for hire or gain and a theatre, or both a theatre and a bowling-alley, is a very comprehensive class—quite comprehensive enough, in my opinion, to take in such a place of amusement as a miniature golf-course.

No doubt the meaning of the statute is to be ascertained by a consideration of the words used; but it is not irrelevant to note that the power conferred is a power to regulate and license, that a miniature golf-course and a bowling-alley possess many common features, and that it is difficult to discover any reason for subjecting the one and not the other to municipal regulation. Each of these places of amusement is a place, comparatively small in area, to which the public resort in some numbers to play, or to look on while others play, a game of skill; and at each, frequently, are persons awaiting their turn to play. Each, therefore, is a place which may well be a source of annoyance to persons resident in the neighbourhood of it unless it is regulated as to hours of play and otherwise. And because of this essential similarity of the two places in respect of the necessity of regulation, and notwithstanding the facts that the games played at the two places respectively are dissimilar and that one of the places, the bowling-alley, requires a covering for protection from the weather, whereas the other, the miniature golf-course, is often, perhaps usually, in the open air, as the defendant's is, I think that there ought to be no judicial exclusion of the miniature golf-course from the class of places of amusement dealt with by the statute and by the statute declared to include a bowling-alley, unless such exclusion is required by the *ejusdem generis* rule of construction. But, as I have said, I find it difficult to discover any *genus* to

which all of the specified places of amusement belong and from which the miniature golf-course can well be excluded. Therefore, I reach the conclusion that there is no reason for saying that the miniature golf-course is not one of the places of amusement dealt with by the statute, and I hold that the by-law in question is one which the statute confers authority to pass.

The contention that the Province has no power to authorise the municipal council to pass a by-law such as the one in question is based upon the cases in which provincial statutes prohibiting the doing of certain acts on Sunday have been held to be *ultra vires* as attempts to create criminal offences. In my opinion those cases do not touch the by-law in question here.

It is not every interference by a Province with the activities of its people on Sunday that is *ultra vires*. What has been held to be beyond the provincial power is prohibitory legislation which in effect treats the acts prohibited as constituting a profanation of the Christian institution of the Lord's Day and declares them punishable as such: see *Ouimet v. Bazin* (1912), 46 Can. S.C.R. 502, and particularly the judgment of Duff, J., at p. 525. Therefore, whenever the validity of a provincial enactment purporting to prohibit the doing of something on Sunday is brought in question, the object of the legislation must be considered. Thus in *Corporation de la Paroisse de St. Prosper v. Rodrigue* (1917), 56 Can. S.C.R. 157, a by-law which began by reciting that it was in the interests of peace and good morals to prohibit the opening of restaurants on Sundays, and which proceeded to forbid, under penalty of a fine, the opening of them on that day, but which contained no provision applicable to other days of the week, was held, by the Court of King's Bench in Quebec (*Rodrigue v. Parish of St. Prosper* (1917), 37 D.L.R. 321), and by the Supreme Court of Canada, to be *ultra vires*, its "purpose and purview" (the expression is that used by the present Chief Justice of Canada, at p. 162 of the report), being, in the words of Lavergne, J. (37 D.L.R. 323), "to legislate . . . upon the observance of the Sabbath."

Similarly, in *Clarke v. Wawken*, [1930] 2 D.L.R. 596, the Court of Appeal in Saskatchewan held invalid a by-law requiring dance-halls to be kept closed on Sunday, but making no attempt to regulate the hours of closing on other days of the week. Mr. Justice Martin (p. 604) thought that the fact that the by-law

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dealt only with Sunday made it "obvious that it was enacted for the purpose of compelling the observance and preventing the profanation of the Lord's Day;" and Mr. Justice Mackenzie (in whose judgment Chief Justice Haultain concurred) was of opinion (p. 607) that if the by-law had been merely a police regulation, it would, in all probability, have provided for the peace and quiet of the community at times other than on Sunday; whence he inferred that the purpose was "to compel the observance of Sunday as a religious institution," and that the by-law was bad.

On the other hand, in *O'Brien v. Royal George* (1921), 57 D.L.R. 301, the Supreme Court of Alberta upheld a municipal by-law which enacted that "Every person licensed to keep a temperance bar shall close his premises at the hour of 11 o'clock on every Saturday night, and keep them closed until 6 o'clock on the Monday morning thereafter, and shall on other nights of the week close such premises at midnight and keep them closed until 6 o'clock on the following morning," the Court being of opinion that, as the by-law required not only Sunday closing but closing at a named hour on each night of the week, it was to be regarded not as a by-law requiring the observance of Sunday as a religious institution, or a by-law for the moral conduct of persons required to observe it, but as one passed for the purpose of insuring the quiet and rest of the persons affected by it at times when the public at large wish to be quiet.

The by-law in question here is indistinguishable from the by-law that was upheld in the *Royal George* case. It bears the appearance of having been passed with the object of regulating the conduct of the business of miniature golf-courses throughout the week, and of securing to the persons affected a reasonable degree of quiet at the times when naturally they would desire to be undisturbed; and there is no reason for supposing that it is not what it appears to be, or for imputing to the council any lack of good faith in the passing of it. Therefore the reasons that prevailed in the *Royal George* case are applicable, and the by-law ought to be upheld as a valid exercise of the police power of regulation.

The questions raised by the stated case will be answered accordingly, and the appeal will be dismissed with costs.

## [APPELLATE DIVISION.]

## DONOVAN V. CITY OF BELLEVILLE.

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July 2.

*Municipal Corporations—Contract for Paving Street—Acceptance of Tender—Resolution of Council—Necessity for By-law—Rescission of Resolution—Action for Breach of Contract—Absence of Seal—Authority of City Clerk—Municipal Act, R.S.O. 1927, ch. 233, secs. 226, 258—Local Improvement Act, R.S.O. 1927, ch. 235, secs. 2(1)(f), 7(1), 8(1).*

The judgment of LOGIE, J. (1930), 65 O.L.R. 246, affirmed.

AN appeal by the plaintiff from the judgment of LOGIE, J. (1930), 65 O.L.R. 246.

June 17. The appeal was heard by MULOCK, C.J.O., 'MAGEE, FISHER, and GRANT, J.J.A.

W. N. Tilley, K.C., for the appellant, contended that the city clerk had authority to bind the city and that he did so by writing to the appellant, advising him that the council had recommended that his tender be accepted. See secs. 226 *et seq.* of the Municipal Act, R.S.O. 1927, ch. 233, also secs. 2, 7, and 8 of the Local Improvement Act, R.S.O. 1927, ch. 235, as to the powers and duties of the city clerk and the procedure of the council. The recommendation by the council that the appellant's tender be accepted, coupled with the passing of by-law 2917 authorising the construction of the pavement, amounts to a final acceptance of the tender. Assuming that the resolution passed by the council is a sufficient acceptance of the tender, the fact that a formal contract was not entered into does not prejudice the appellant's claim.

A. Bernard Collins, for the defendant corporation, respondent, contended that the resolution passed by the council was merely an expression of willingness to contract, and not a contract in itself. The city clerk had no authority to send notice of the resolution to the appellant and he had no authority to bind the respondent corporation: *John Mackay & Co. v. Toronto City Corporation*, [1920] A.C. 208. A corporation can contract only under its corporate seal: *Stowe v. Currie* (1910), 21 O.L.R. 486; *Rosssdale v. Denny*, [1921] 1 Ch. 57; *Wilson v. Balfour* (1929), 45 Times L.R. 625.

July 2. MAGEE, J.A.:—The appellant plaintiff has three formidable hills of difficulty to surmount. First, was there an acceptance of his tender? Second, was any contract intended to be in force until the execution of the formal contract and bond men-

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tioned in the specifications? And, third, was the seal of the defendant corporation to the contract necessary?

Whether the resolution as to his tender was that of a committee or of the council, it is certainly not worded as being a final acceptance and would appear to have been carefully framed to avoid being so. It merely recommended the acceptance of his tender; and the communication of the resolution by the clerk to the plaintiff, whether authorised or not, did no more than send him a copy. I do not see how such a recommendation can be said to be acceptance, or to have been intended to operate as binding until the formal contract should be entered into. For this reason of itself the plaintiff in my opinion fails and it is not necessary to enter into the other questions raised.

GRANT, J.A.:—An appeal from the judgment of Logie, J., pronounced on the 12th March, 1930, dismissing the plaintiff's action for damages for breach of an alleged contract for the paving of a portion of Cannifton-road in the city of Belleville.

In August, 1929, the council of the defendant city decided to call for tenders for the paving of the above-mentioned highway within the city limits, and an advertisement was published in the following month. The form of contract to be entered into between the corporation and the contractor, whoever he might be, was furnished, together with specifications, plans, etc., for inspection by the proposed tenderers. The plaintiff put in a tender, and on the 10th September, at a special meeting of council, at which the tenders were opened, a resolution was passed in the following terms:—

“Recommended that tender of John Donovan be accepted for the paving of Cannifton-road at a cost of \$12,843.”

Although it does not so appear upon the record, it was stated to us by counsel for the defendant corporation that this resolution was passed by a committee of council, and the form of the resolution would appear to bear out that statement, as the council would not recommend to itself the acceptance of a tender.

On the same day the council passed by-law No. 2917, under the provisions of the Local Improvement Act, “to authorise the construction of an asphalt pavement on macadam base, together with kerb, all necessary storm sewers, etc., on Cannifton-road from Station-street to College-street.”

Clause 4 of the same by-law reads as follows:—

"4. The mayor and clerk are authorised to cause a contract for the construction to be made and entered into with some person or persons, firm or corporation, subject to the approval of this council to be declared by resolution."

As the by-law was subsequent in time to the resolution, and the by-law apparently contemplates a resolution to be passed afterward rather than before the by-law itself, it has been suggested that the resolution in question, even if in all other respects sufficient for the plaintiff's purpose, would not fulfil the requirements of the by-law. Even though it were to be held, as contended by Mr. Tilley, that this by-law was a legislative act, and, as such, should be interpreted as speaking from the first moment of that day (as to which I express no opinion), this would not avail to establish the plaintiff's claim.

On the 11th September, without any specific instructions so to do, the city clerk wrote the plaintiff as follows:—

"I beg to advise you that at the September meeting of the city council held last evening the following recommendation was passed: 'Recommended that the tender of John Donovan be accepted for the paving of Cannifton-road at a cost of \$12,843.'"

No formal contract was entered into or executed by the city corporation, although, in conversations with the plaintiff, the mayor of the city apparently recognised that the plaintiff, as successful tenderer, would be expected to start work promptly, and discussed with the city's engineer the taking of the necessary steps with that in view. Shortly afterward, some of the property-owners on Cannifton-road having expressed the wish that a different kind of surfacing should be put upon the road, the council reconsidered the whole matter and subsequently, namely, on the 30th September, rescinded the resolution regarding the plaintiff's tender and accepted the tender of another contractor, authorising the mayor and clerk to execute the contract with the latter. On the 1st October, the city clerk wrote the plaintiff notifying him of the latter decision of the council.

The learned trial Judge dismissed the action, holding himself bound by the decision of the Judicial Committee in *John Mackay & Co. v. Toronto City Corporation*, [1920] A.C. 208.

The principal contention put forward by counsel for the plaintiff, stated briefly, was as follows: That the doing of the work, that

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App. Div. is, the paving of the street by local improvement, was authorised  
1931. by by-law 2719; that the by-law itself provided that the mayor  
DONOVAN and clerk were authorised to cause a contract to be made and en-  
v. tered into subject to the approval of the council to be declared by  
CITY OF resolution; that such resolution approving the acceptance of the  
BELLEVILLE. tender of the plaintiff had been duly passed; that written notice  
Grant, J.A. thereof had been sent by the clerk of the municipality to the plain-  
tiff, and that, by virtue of the above, a contract binding upon the  
defendant corporation had been constituted.

The duties of the clerk are set out in sec. 226 of the Consolidated Municipal Act, which is R.S.O. 1927, ch. 233. After enumerating certain duties which did not include the sending of any such notice as was written here, by clause (f) is stated the further duty "to perform such other duties as may be assigned to him by the council." There is nothing upon the record to indicate either that he had general instructions from the council to send out letters of acceptance such as he assumed to send in the present case, nor that any instructions were given to him to send out this notice. The clerk appears to have done it upon his own responsibility. In my opinion the clerk had no authority to write the letter purporting to notify the plaintiff of the acceptance of his tender, and for that reason I would be prepared to hold that his sending of the notice could not bind the corporation or operate as an acceptance sufficient to form a binding contract, even if the corporation could be bound otherwise than by a document entered into under its corporate seal.

Upon the argument I inquired of counsel if notice might not be given to the plaintiff of the acceptance of his tender, by the passing of the resolution in open meeting, if the plaintiff were present in the council chamber and heard the resolution put and passed. Having considered the question, I have come to the conclusion that in a case in which, like the present, a document under seal is necessary in order to constitute a binding contract on the part of a municipality, no binding effect could be given to the mere passing of the resolution within the hearing of the plaintiff. Although ratepayers may be present during the deliberations of a municipal council, yet such deliberations and the discussions take place and by-laws and resolutions are passed within the council itself, the ratepayers being spectators only, their presence or absence having no legal effect upon what is being done. In my

view of the matter, neither a by-law nor a resolution of the council would confer upon the plaintiff any rights *quâ* contractor with the municipality unless and until a properly authorised notice be given to him of the action of the council, and not even then if the seal of the corporation were necessary to bind the corporation and the seal were lacking.

By sec. 258 of ch. 233 (*supra*) it is provided (1) that, except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law.

By the Local Improvement Act, R.S.O. 1927, ch. 235, sec. 2 (1) (*f*), the council of a corporation is authorised to undertake the work of paving a street as a local improvement.

By sec. 7 (1), the council may pass a by-law for undertaking a work as a local improvement under certain circumstances therein stated, one of them being (*d*) "without petition in the case mentioned in sections 4 and 8." By sec. 8(1), where the council determines and, by by-law or resolution passed at any general or special meeting by a vote of two-thirds of all the members thereof, declares that it is desirable that the construction of a . . . pavement . . . should be undertaken as a local improvement, the council may undertake the work without petition, etc.

In the present case a by-law was duly passed authorising the construction of the pavement as a local improvement. The council was, therefore, authorised to enter into a contract to have such work done. Middleton, J.A. (then Middleton, J.), in *Wilson v. Town of Ingersoll* (1916), 38 O.L.R. 260, where a by-law had been passed authorising the execution of a contract and the mayor refused to sign it, the council thereupon appointing an acting mayor to execute it in his place, which was duly done, expressed the opinion that it was not necessary under such circumstances that a by-law should be passed for the approval of the contract itself, which latter was under the corporation seal. Assuming that decision to be well-founded, it would mean in the present case that if there were a contract under the corporation's seal, no approval of the contract by by-law would be essential. That, however, would not be of much assistance in the case at bar, as no contract has been executed with the corporate seal of the municipality.

I have read the cases to which we were referred by counsel, and I have reached the conclusion that the decision of the learned

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trial Judge was right; there being no contract between the defendant municipality and the plaintiff, executed with the corporate seal, the plaintiff cannot succeed in his claim for damages. The section of the Municipal Act is identical in language with that which was in force when the decision in *John Mackay & Co. v. Toronto City Corporation*, [1920] A.C. 208, was pronounced.

In the present case we are, therefore, invited by the plaintiff to hold that, even though there be no by-law under seal authorising or approving of a contract with the plaintiff, and no contract executed by the municipality with its corporate seal, yet, notwithstanding the absence of both of these, a valid and binding obligation has been entered into.

I am unable to assent to that proposition. It is not the case of engaging a servant in a minor position, or of purchasing note-paper for office use in the municipal offices, or any other similar routine transaction, such as is suggested in the opinion expressed in the *Mackay* decision. It is not even a work which the municipality is compelled to undertake, such as the prevention of a nuisance or a dangerous condition in the highway, or other matter of a similar nature involving a statutory duty on the part of a municipality, which is imperative. It is not necessary for this decision to determine the question whether or not there must be both a by-law under seal authorising a contract with the plaintiff and a contract executed under the seal of the corporation to fix the latter with liability. It is sufficient to state that in this case both are lacking, and the corporation has not become legally obligated to the plaintiff. So also the present case is not to be confused with the line of cases in which the alleged contract has been wholly executed on one side and the corporation is precluded by its conduct from denying its obligation.

I am, therefore, for the reasons stated, of the opinion that the judgment must be affirmed and the plaintiff's appeal dismissed with costs.

MULOCK, C.J.O., and FISHER, J.A., concurred.

*Appeal dismissed.*

## [APPELLATE DIVISION.]

## RE VILLAGE OF ROCKCLIFFE PARK AND COUNTY OF CARLETON.

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*Assessment and Taxes—Equalization of Assessments of Local Municipalities for County Purposes—Assessment Amendment Act, 1931, 21 Geo. V. ch. 51, sec. 8, adding sec. 96a. to Principal Act—Construction of—Whether Prospective or Retrospective—Method of Equalization.*

Reading sec. 96a. of the Assessment Act, as enacted by sec. 8 of the Assessment Amendment Act, 1931, 21 Geo. V. ch. 51, as a whole, and having regard to the existing method of arriving at an equalized assessment, *held*, that the new section was intended to govern the future method of equalizing the assessment and the limited right of the county to levy rates by reason of such altered method. The curtailment of the power to levy in future was to be in respect of an equalization arrived at by the altered method but effected according to the orderly procedure already established by the Assessment Act and not otherwise. The new section did not contemplate and does not effect, for one year only, a drastic and revolutionary abrogation of all that had been legally and validly done to make a basis for the 1931 rate and the substitution therefor, if there is to be any 1931 county rate throughout Ontario at all, of some method of equalizing the rate which has no statutory sanction and which may prove to be so chaotic and uncertain as to cast doubts upon the validity of any county rate during the year 1931.

Sections 89, 90, and 92 of the Assessment Act considered.

MOTION on behalf of the Corporation of the Village of Rockcliffe Park to quash by-law No. 1013 of the Corporation of the County of Carleton for illegality.

The motion was heard by LOGIE, J., in the Weekly Court at Ottawa.

*H. P. Hill*, K.C., for the applicant village corporation.

*V. S. McClenaghan*, for the respondent county corporation.

May 15. LOGIE, J.:—The by-law sought to be quashed is a by-law of the Municipal Corporation of the County of Carleton, whereby that corporation assessed and levied the sums necessary to pay the valid debts of the corporation falling due during the current year 1931, on the whole property within the county liable to assessment, pursuant to sec. 92 of the Assessment Act, R.S.O. 1927, ch. 238.

This section was construed by Mulcahy, Judge of the County Court of the County of Renfrew, in *Re Town of Pembroke and County of Renfrew* (1929), 35 O.W.N. 364. At p. 366 the learned County Court Judge says:—

“Section 92 of the Assessment Act, dealing with the mode of basing the apportionment of county rates, is worthy of close scru-

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tiny. The words 'in order that the county rates may be assessed equally on the whole ratable property of the county' mean 'in order that the county rates press with equal and proportionate severity upon all classes of property liable to rates'—ratable property, by sec. 3 of the Act, being defined as including income and business."

And he refers to *Re Township of Stamford and County of Welland* (1916), 37 O.L.R. 155, as containing much valuable reasoning which assists him to the conclusion which he reached in that case.

On appeal to a Divisional Court of the Appellate Division on the 7th January, 1929, his judgment was affirmed.

Equalization is solely for the purpose of determining the proportion in which the aggregate amount required for the purposes of the county is to be divided amongst the municipalities. "County rates" is synonymous with "taxation for the expenses of the county." The sums at which the various assessment rolls are equalized determine the proportions in which the whole amount to be levied for the year in which the equalization is used is to be divided amongst the municipalities composing the county. The county council by an arithmetical calculation determines what amount of money each municipality must contribute, on the basis of the equalization, to the treasury of the county. Then what equalized roll is to be used in any year? Section 89(1) says it is "the assessment of the property equalized in the preceding year" that is to be "the basis on which the apportionment is to be made:" *In re Revell and County of Oxford* (1877), 42 U.C.R. 337. In that case it was said:—

"Two things are indispensable to the working of this branch of the assessment law. The one is, that yearly there shall be an equalization for the purpose of producing a just relation between the assessments of all local municipalities of the county. The other is, that when this is yearly accomplished, it shall be ready for use whenever it may, under the statute, be *properly* used."

Again, Chief Justice Harrison says, at p. 345:—

"The machinery, as a matter of fact, is never completed until the year is well advanced, and would not, under any circumstances, be available for county rates in the first half of the year. It could not, therefore, in the first part of the year be made the basis for county taxation for that year. . . . Now this is what we think

the Legislature intended when . . . enacting that the amount of property returned on the rolls as finally revised and equalized for the preceding year, shall be the basis of apportionment for the current year." See Weir's Assessment Law, pp. 226, 227.

In other words, the equalization made in 1930 on the basis of the assessment rolls of 1929 should be used in 1931 for the apportionment in 1931 of the county taxation amongst the municipalities of the county. See *Re Township of Nottawasaga and County of Simcoe* (1902), 4 O.L.R. 1.

No doubt, with the intention of relieving local municipalities which impose an income assessment on their ratepayers and to place them in the same position as local municipalities which do not impose such assessments, the Legislature by the Assessment Amendment Act, 1931, 21 Geo. V. ch. 51, sec. 8, amended the Assessment Act as follows:—

"8. The Assessment Act is amended by adding thereto the following section:—

96a.—(1) Notwithstanding anything in this Act or any other special or general Act contained, income assessments of a local municipality forming part of a county shall not be included in any statement given to the county clerk, nor shall they be included in, but shall be excluded from, any valuation and equalization by a county council of ratable property in the county for any county purpose, and the ascertainment, imposition or levy by a county council of any rate for county purposes shall be made and raised upon and from the equalized assessment of real property and business assessments only in the county.

"(2) When under this Act or any other special or general Act any rate is directed or required to be levied in a local municipality forming part of a county for county purposes, the same shall in the local municipality be calculated and levied upon and against the whole ratable property including assessments of income within such local municipality according to the last revised assessment roll thereof."

The bill introducing this Act received the royal assent on the 2nd April, 1931, and the applicant contends that if the Legislature had not intended it to apply to the assessment for 1931 for county purposes the Legislature would have so stated, either in the clause itself or in some subsequent clause, providing that it should not come into force until

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Logie, J. some later day, e.g., the 1st January, 1932, and he points out that the Legislature in sec. 15 of the amending Act provided that secs. 2 and 4 of the Act should not come into force forthwith, but should come into force on the 1st day of January, 1932, and he contends that, as by-law 996 of the Municipal Corporation of the County of Carleton, equalizing the assessments for the purpose of county rates, passed the 21st day of June, 1930, and setting forth the equalized assessment of each of the 13 municipalities, included in each assessment an amount for income assessment, all that is necessary for the county council to do is to deduct from each amount the amount of the income assessment now included therein, and so it would not be necessary to pass a new equalization by-law. All that would be required would be to pass a by-law in lieu of by-law 1013, in which the amount charged to the various local municipalities would be based on the figures arrived at by deducting the income assessment in each case from the equalized assessment as shewn in by-law 996. This is a simple and ingenious way of arriving at a basis of taxation for county purposes, but I am quite unable to agree with it, and there is no authority for such a course.

Although counsel for the applicant strenuously contends that the amending Act thus construed is prospective and not retrospective, I am of opinion that such a construction would give the Act a retrospective effect. In *Gardner v. Lucas* (1878), 2 App. Cas. 582, 601, Lord O'Hagan said:—

“Unless there is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that an Act is prospective and not retrospective.”

And a statute is deemed to be retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past: Craies on Statute Law, 3rd ed., p. 324.

Now in order to see whether the amending statute, if construed as counsel for the applicant would have me construe it, falls within the definition above set out, it is necessary to consider whether its language is such as plainly to require such a construction: *Lauri v. Renad*, [1892] 3 Ch. 402, 421.

Section 96a. must be read as a whole, and further it must be

read in connection with other sections of the same Act, and Acts *in pari materiâ*. These are the following:—

The Municipal Act, R.S.O. 1927, ch. 233, sec. 306 (1): “The council of every municipality shall in each year assess and levy on the whole ratable property within the municipality, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year, but shall not assess and levy in any year more than two and a half cents in the dollar on the assessed value of such property according to the last revised assessment roll, exclusive of school and local improvement rates and exclusive of any rate not exceeding two mills in the dollar for granting aid to public hospitals for the purposes mentioned in paragraph 28 of section 396.”

The Assessment Act, R.S.O. 1927, ch. 238, sec. 2: “All municipal, local or direct taxes or rates shall where no other express provision is made be levied upon the whole of the assessment for real property, income and business or other assessments made under this Act, according to the amounts assessed in respect thereof, and not upon any one or more kinds of property or assessment or in different proportions.”

Section 3: “Wherever in the Municipal Act, or in any other general or special Act of this Legislature or in any by-law passed under any such Act, the yearly rates or any special rate are expressly or in effect directed or authorised to be levied upon all the ratable property of the municipality for any municipal or school purpose, such rates shall be calculated at so much in the dollar upon the total assessment of the municipality and shall be calculated and levied upon the whole of the assessment for real property, income and business or other assessments made under this Act.”

Section 87 (1): “When, after the appeal provided by this Act the assessment roll has been finally revised and corrected, the clerk of the municipality shall within ninety days transmit to the county clerk a summarised statement of the contents of the roll shewing the total population of the municipality and the total assessment of each of the various classes of property liable to assessment, and when required to do so by the county judge or by resolution of the county council for the purpose of equalization or otherwise produce the original assessment roll of the municipality.”

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Section 89 (1): "The council of every county shall, yearly, and not later than the first day of July, examine the assessment rolls of the different townships, towns and villages in the county, *for the preceding financial year*, for the purpose of ascertaining whether the valuations made by the assessors in each township, town or village bear a just relation one to another; and may, by by-law for the purpose of county rates, increase or decrease in any township, town or village, the aggregate valuations, adding or deducting so much per centum as may, in their opinion, be necessary to produce a just relation between them; but they shall not reduce the aggregate valuation for the whole county as made by the assessors."

Section 90 (1): "If any municipality is dissatisfied with the action of any county council in increasing or decreasing, or refusing to increase or decrease the valuation of any municipality, the proceedings shall be as follows:—

"1. The municipality so dissatisfied may appeal from the decision of the council at any time within twenty days after the passing of such by-law, by giving to the clerk of the county council notice in writing, which notice shall state whether the municipality appealing is willing to have the final equalization of the assessment made by the county judge."

Section 90 (9): "It shall be the duty of the judge to dispose of the appeal before the first day of January next after the appeal."

Section 92: "The council of a county, in apportioning a county rate among the different townships, towns and villages within the county, shall, in order that the same may be assessed equally on the whole ratable property of the county, make the assessment of property equalized in the preceding year the basis upon which the apportionment is made."

Section 96a.—(1) "Notwithstanding anything in this Act or any other special or general Act contained, income assessments of a local municipality forming part of a county shall not be included in any statement given to the county clerk, nor shall they be included in, but shall be excluded from, any valuation and equalization by a county council of ratable property in the county for any county purpose, and the ascertainment, imposition or levy by a county council of any rate for county purposes shall be made and raised upon and from the equalized assessment of real property and business assessments only in the county."

Section 225: "The treasurer of every township, town or village shall, on or before the 20th day of December in each year pay to the treasurer of the county all moneys which were assessed and by law required to be levied and collected in the municipality for county purposes and for any of the purposes mentioned in section 222, and in case of non-payment of such moneys or any portion thereof on or before the said date the township, town or village so in default shall pay to the county interest thereon at the rate of six per centum per annum from the said date until payment shall be made."

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I think that the words in sec. 96a., "notwithstanding anything in this Act or any other special or general Act contained," apply to secs. 2, 3, 87, and 89(1) of the Act, as well as sec. 92, and that they should be read in the light of the provisions of sec. 96a.

The amendment coming into operation upon the Act receiving the royal assent must guide the clerks of local municipalities this year in preparing the statement required by sec. 87 (1), and it is doubtful whether after this year there will be any suggestion that sec. 92 is in any way affected by this amendment, so long as the Act remains in its present form.

As I have said, sec. 96a. must be read as a whole, and also read in the light of every other provision dealing with income assessments in the Assessment Act and the Municipal Act. Read in this way, it is quite clear from the words of the section itself that it is only intended to apply to a state of affairs subsisting after the passing of the Act. The words "income assessments of a local municipality forming part of a county shall not be included in any statement given to the county clerk," clearly indicate the intention of the Legislature that this section coming into effect immediately after the passing of the Act could only affect the statement to be filed by the clerk of the local municipality in the county clerk's office this year and shewing the assessments of last year.

Again, the words "nor shall they be included in, but shall be excluded from, any valuation" are directions to the county clerk that income assessment of local municipalities shall not be included in the valuation and equalization of the ratable property in the county for county purposes. If in the statement forwarded to him income assessment is included he is directed to exclude that assessment from that return for the purpose of valuation and equalization of ratable property in the county for county purposes.

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The words "and the ascertainment . . . by a county council of any rate for county purposes shall be made and raised" clearly refer to prospective acts and as clearly indicate that the Act is not intended to be retrospective.

To interpret sec. 96a. in a retrospective manner so as to nullify what has been done under sec. 92 of the Assessment Act before the amendment, I think takes away or impairs a vested right acquired under existing laws, creates a new obligation, and attaches a new disability in respect of transactions already past. It is not, as contended by counsel for the applicant, a mere inconvenience.

The statement under sec. 87 of the Act was filed by the applicant on the 13th May, 1930, and shewed a realty assessment of \$1,336,113, and an income assessment of \$420,530. The assessing and levying by-law No. 1013, the by-law in question, assesses and levies against Rockcliffe Park the sum of \$33,356.79, and the actual amount of money involved therefore is \$7,848, or nearly one-quarter of the total contribution of the applicant to county rates. If therefore this is taken off the applicant's taxes, it must be assessed and levied against the other municipalities, because, under sec. 306 (1) of the Municipal Act of Ontario, the respondent is required to assess and levy 100 per cent. of the money required to meet its debts, and it would be necessary to amend the equalization by-law of 1930 above referred to, namely, by-law No. 996 of the County of Carleton.

The redistribution of the sum of \$7,848 would require a change in the percentage arrived at under the latter by-law, which is the basis of the computation of the amounts payable by the various municipalities under the assessing and levying by-law No. 1013, and because of this the respondent would have to pass another equalization by-law, and thereupon there would arise the creation of a new obligation, or the attachment of a new disability, which is the vice of reading a statute retrospectively.

Then again the time for appeal under sec. 90 of the Assessment Act would begin to run again and any municipality being dissatisfied could appeal. This appeal, by subsec. 9 of sec. 90, need not be disposed of by the Judge until the 31st December after the hearing thereof.

Again, under sec. 225 every municipality is required to pay county moneys to the county treasurer before the 20th December in each year, and the result, as was stated by counsel for the re-

spondent, would be chaos, because in the meantime the equalization for this year must be got on with and the taxes must be collected.

It is clear that sec. 96*a.* does go into force forthwith, but that it is prospective, and that the statements to be filed by the clerks of the local municipalities in the current month of May must not include income assessments, and that the equalization by-law to be passed in June, 1931, will be based upon such statements, and that the ascertainment, imposition, or levy by the county council of any rate for county purposes shall be made and raised upon and from the equalized assessment of real property, and business assessments only in the county, and will exclude income assessments, which latter, of course, will still be available for the local municipalities.

I think that counsel for the applicant has overlooked the provisions of sec. 305 (1) of the Municipal Act, and in doing so naturally failed to appreciate that the interpretation which he places upon sec. 96*a.* would make it retrospective legislation, and that the effect of his argument would by implication repeal sec. 92 of the Assessment Act for the year 1931 only.

There is no indication, either from the subject-matter or from the wording of the statute in question, that it is to receive a retrospective construction. On the contrary, looking at the general scope and purview of the statute and at the remedy sought to be applied, and considering what was the former state of the law, and what the Legislature contemplated, it is clear that the Legislature could not have contemplated a state of chaos and that it intended the section to be prospective.

*Application dismissed with costs.*

The village corporation appealed from the order of LOGIE, J.

June 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, JJ.A.

*G. W. Mason*, K.C., for the appellant corporation. The new sec. 96*a.*, enacted by sec. 8 of the Assessment Amendment Act, 1931, 21 Geo. V. ch. 51, adding sec. 96*a.* to the Assessment Act, is not retroactive, nor is the argument for the appellant based on any retroactivity being ascribed to the section. The new section speaks as from the 2nd April, 1931. By-law 1013 of the County of Carleton, providing for the imposition of the county rate, was passed on the 17th April, and it should therefore have conformed to the

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provisions of the statute which had come into effect on the 2nd April. There is nothing retroactive in this claim. The county council must ascertain, impose, and levy this year the rate for county purposes upon and from the equalized assessment of real property and business assessments only in the county. The Legislature, in adopting the amendment, merely says that, instead of proceeding under sec. 92, the county council must proceed in another way. There is nothing retroactive in such legislation. It is entirely prospective. The words, "Notwithstanding anything in this Act or any other special or general Act contained," occurring in the opening of sec. 96a., must be given their ordinary meaning: *Regina v. Bishop of Oxford* (1879), 4 Q.B.D. 245, at p. 261. Consequently they mean that in ascertaining, imposing, and levying the rate, sec. 92 is to be disregarded.

*V. S. McClenaghan*, for the county corporation, respondent. Section 96a. does not apply to the year 1931. The construction sought to be placed on that section will make it of retroactive operation. This is so especially in view of sec. 306, subsec. 1, of the Municipal Act, as amended by 20 Geo. V. ch. 44, sec. 12, and sec. 92 of the Assessment Act. It would be necessary to amend the equalization by-law of 1930, No. 996, also by-law 1013, and also to pass in 1931 an equalization by-law which would repeal by-law 996, in order to carry out the contention of the appellant. This would create a chaotic condition. It cannot be assumed that the Legislature would undo all the work of assessing and equalizing of last year and thereby nullify sec. 92 of the Assessment Act and sec. 306, subsec. 1, of the Municipal Act.

July 2. The judgment of the Court was read by ORDE, J.A.:—The facts and the relevant sections of the Assessment and Municipal Acts are all set forth in the judgment of Logie, J., and need not be repeated.

Notwithstanding the able and forceful argument of Mr. Mason, I have come to the conclusion that the appeal must be dismissed. I have reached this view, not because of any inconvenience that might arise in bringing about a readjustment of the equalized assessment if the appellant's contentions were to prevail (because if the amendment of 1931 had the effect for which the appellant contends, the Court would be bound so to hold, however disastrous the consequences might be), but because a consideration of the amendment with the other relevant sections of the Assess-

ment Act convinces me that it was not intended to override an equalization of assessment already validated for county purposes, as a basis for taxation for the next ensuing year.

The amendment of 1931 reads as follows (as set out above).

Now it is true that the opening words, "Notwithstanding anything in this Act or any other special or general Act contained," might lend colour to the argument that the new section is to be read and interpreted without regard to any other provisions of the Assessment Act. But that is not, in my judgment, their effect. I think they mean only that any provision of the Assessment Act in conflict with the provisions of the amending section are to give way, and therefore to be deemed to be in effect repealed. But it does not follow that we are not to look at the other provisions of the Act for light upon the meaning of the amendments.

If the operative parts of subsec. 1 of sec. 96*a*. are to be detached from each other and to be construed as peremptorily controlling all future actions of the county council without regard to the existing basis for taxation, then there is much to support the appellant's argument.

But this, in my opinion, is not the proper way to construe the section. Under the legislation then in force the county council had, on the 21st June, 1930, passed by-law No. 996 equalizing the assessment of those municipalities liable for the county rate. That included, as the law required, income assessment as well as realty. By the by-law the percentage of each municipality of the total equalized assessment was fixed.

This by-law was passed under the provisions of sec. 89 of the Assessment Act, by which a county council is empowered for the purpose of the county rate to increase or decrease the aggregate valuation in any of the municipalities to be taxed, so as to produce a just relation between them, and it seems to be clear from the concluding words of subsec. 1 that in so adjusting the relative values the aggregate valuation for the whole county must not be reduced. It would seem to follow from this that decreases must be made up by corresponding increases so as not to reduce the total valuation.

The by-law, under sec. 89, must be passed not later than the 1st July, and the equalization is based upon the assessment rolls of the preceding year. Under sec. 90 the equalization by the county council is subject to an appeal to the judge of the county

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or of some other county, who must dispose of it before the 1st January of the next year. And from him an appeal lies to the Appellate Division.

The equalized assessment then becomes the basis for the next year's county rate, and there is no other basis for the imposition of the county rate but the equalized assessment as so fixed by the county council, or, if appealed from, by the County Court Judge or the Appellate Division.

The appellant's contention is that all the elaborate proceedings which were a necessary preliminary to the power of the county council to fix the county rate for the year 1931 go by the board, by reason of the explicit words of the amendment, which, in effect, it is argued, declare that thereafter the "levy by a county council of any rate for county purposes shall be made and raised upon and from the equalized assessment of real and business assessments only in the county."

Is that what the Legislature intended? If it were possible, having regard to the machinery for equalization set up by the Act, to effect a final equalization upon the new footing in the course of a few days or weeks, this contention would have more weight. But that is impossible. And it is to be observed that the future basis for levying the rate is to be the "equalized" assessment of real property and business assessments.

What is meant by "equalized"?

Not, in my judgment, an equalization effected by the mere elimination of income assessment from the equalized assessment made by by-law 996, but such an equalized assessment as the machinery of the Assessment Act, as amended by sec. 96a., would necessitate, that is, the consideration *de novo* of the respective valuations as required by sec. 89, with the right of any municipality to appeal under sec. 90. The mere subtraction of its income assessment from each municipality's total assessment would not, in my judgment, make the result an equalized assessment as the basis of the 1931 county rate at all, within the meaning of sec. 92. And the consequence might be that the whole county rate for 1931, not only in the county of Carleton, but in every county in Ontario, might prove to be invalid.

I am of the opinion that, reading the new sec. 96a. as a whole, and having regard to the existing method of arriving at an equalized assessment, the amendment was intended to govern the future

method of equalizing the assessment and the limited right of the county to levy rates by reason of such altered method. The curtailment of the power to levy in future was to be in respect of an equalization of assessment arrived at by the altered method but effected according to the orderly procedure already established by the Assessment Act and not otherwise. The amendment did not contemplate and does not effect, for one year only, a drastic and revolutionary abrogation of all that had been legally and validly done to make a basis for the 1931 rate and the substitution therefor, if there is to be any 1931 county rate throughout Ontario at all, of some method of equalizing the rate which has no statutory sanction whatever and which may prove to be so chaotic and uncertain as to cast doubts upon the validity of any county rate during the present year.

For this reason I think the appeal must be dismissed with costs.

*Judgment accordingly.*

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[APPELLATE DIVISION.]

SECURITIES DEVELOPMENT CO. LTD. v. NOBLE AND HODGINS.

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July 6.

*Partnership—Lease of Business Premises Signed by one Partner without Knowledge of the other—Premises never Occupied by Firm—Non-liability of Firm and other Partner for Rent — Authority of Partner Signing—Articles of Partnership—Costs.*

H. entered into a partnership with N. as brokers. Desiring an office, N. signed on behalf of the partnership and in the partnership name a lease of property owned by the plaintiff. N. told nothing of this to H. On H. going to the city where the business was to be carried on, the two looked over certain premises and took an office. The firm never took possession of the plaintiff's premises. The plaintiff, by this action, begun in January, 1931 sued the firm in a Division Court for arrears of rent. The summons was not served upon H., but he heard of the action and defended. He knew nothing of N. signing a lease until December, 1930, never saw the lease until the trial, and at no time ratified the action of his partner. At the trial N. and H. as individuals were added as defendants, and in the Division Court judgment went against the partners and the firm for the amount sued for. The firm and H. appealed. N. was admittedly liable. The partnership articles were not in evidence at the trial, but were produced upon the appeal and shewed the partnership to be one at will:—

*Held*, there having been no occupation of the premises by the firm and N. having had no authority to bind his partner, that H. and the firm were not liable for the rent.

If there are no partnership articles, no implied authority is given by law to one partner to take property on lease for the purpose of

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carrying on the partnership business. The authority of the partner so acting is to be proved, if not otherwise, by the articles of partnership.

*Sharp v. Milligan* (1856), 22 Beav. 606, *dictum* in, and *Clements v. Norris* (1878), 8 Ch. D. 129, followed.

*Griffith v. Hughes* (1847), 9 L. T. Jour. 147, distinguished.

It being the duty of the plaintiff to establish the liability of the non-acting partners, where the firm has not accepted the leased premises, either by the articles of partnership or otherwise, the appellants should have their full costs of appeal.

AN appeal by the defendant partnership and the defendant Hodgins from the judgment of the 7th Division Court of the County of Essex (MAHON, Co.C.J.) in favour of the plaintiff company against all the defendants in an action for rent of premises in the city of Windsor.

June 15. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, J.J.A.

*Lyle Ramsey*, for the appellants, contended that the defendant Noble had no authority to bind the appellants by taking a lease. Reference to the Partnership Act, R.S.O. 1927, ch. 170, sec. 7; *Sharp v. Milligan* (1856), 22 Beav. 606; Lindley on Partnership, 8th ed., pp. 176, 177; 8 C.E.D. (Ont.), p. 348; *Hamilton Provident and Loan Society v. Steinhoff* (1896), 23 A.R. 184; *Clement v. Norris* (1878), 8 Ch. D. 129.

*S. L. Springsteen*, for the plaintiff company, respondent, contended that Hodgins and the firm were bound, as found by the judgment appealed from. Reference to *Griffith v. Hughes* (1847), 9 L.T. Jour. 147.

July 6. The judgment of the Court was read by RIDDELL, J.A.:—The facts of this case are somewhat peculiar, but, when they are understood, I think there can be no doubt of the law applicable.

The defendant Hodgins, living in Leamington, entered into partnership with the defendant Noble as brokers; desiring an office, Noble signed on behalf of the partnership and in the partnership name, a lease of certain property owned by the plaintiff. He told nothing of this to Hodgins, but on Hodgins going to Windsor, where the business was to be carried on, Noble, having written him at Leamington that he had been looking over available premises and had partly agreed on some, the two looked over certain premises and took another office.

The firm never took possession of the plaintiff's premises; a summons was issued from the Seventh Division Court of the County of Essex on the 13th January, 1931, against "Ross, Noble-Hodgins Company," claiming \$216 as arrears of rent. This summons was not served upon Hodgins, but he heard of the action, and defended. The first that Hodgins knew of his partner signing a lease was in December, but he never saw the lease until the trial, and he did not at any time ratify the action of his partner.

At the trial, the summons was amended so as to add, as defendants, Noble and Hodgins as individuals; and, in the result, judgment went against the partners and the firm for the amount sued for.

The firm and Hodgins appeal; the defendant Noble is admittedly liable.

There was no occupation of the premises by the firm, so as to make applicable the actual decision in *Sharp v. Milligan*, 22 Beav. 606; but I agree in the dictum of Romilly, M.R., at pp. 609, 610: "Where partners simply enter into an agreement to carry on a partnership of which the term is not fixed, one of those partners would not have authority, within the scope of the partnership contract, to take a lease of twenty-one years, and bind the other partners." Nothing, of course, turns upon the words "twenty-one years," the principle is the same for any fixed term, as it may extend beyond the term of the partnership. But the law goes further and requires the authority of the partner so acting to be proved, if not otherwise, by the articles of partnership.

In *Clements v. Norris*, 8 Ch. D. 129, at p. 133, Jessel, M.R., says:—

"In the first place, supposing there were no partnership articles at all, is there any implied authority given by law to one partner enabling him to take property on lease for the purpose of carrying on a portion of the partnership business? No authority has been cited, nor am I aware of any, in support of the affirmative."

I am in the same state of nescience: and adopt the conclusion.

The case of *Hyde v. Webster* (1914), 50 Can. S.C.R. 295, referred to in 8 C.E.D. (Ont.), at p. 348, is to much the same effect. See also *Hamilton Provident and Loan Society v. Steinhoff*, 23 A.R. 184. No support for the position of the plaintiff to render the firm or the non-concurring partner liable can be drawn from any of the standard works on Partnership.

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There are certain expressions in the case of *Griffith v. Hughes*, 9 L.T. Jour. 147, which might be taken to indicate a different conclusion; but these expressions must be read in connection with the facts of the case. The plaintiff, an attorney, was engaged by the owner of a mill to have a mortgage on the mill paid off; the client carried on the business of milling in partnership with several other persons, all of whom knew of the mortgage and had ordered their clerk to pay the interest on it; it was held by the Court of Queen's Bench that these others were liable to the attorney for his bill of costs. Wightman, J., during the argument, said: "They cannot carry on their business without the mill;" and, Denman, C.J., giving judgment, said:—

"It is quite a fallacy to suppose that partners are not liable except upon contracts relating to the article in which they deal. They must have a place wherein to carry on their business; and if partners take a shop for that purpose, though one only should act, yet both are liable for the use of it. Here one of the partners is owner, subject to a mortgage; the partners are his lessees; and the manager or clerk acts for all. Under these circumstances, therefore, I think that the defendants are liable to the attorney."

Patteson, J., added: "The plaintiff was, in fact, employed to protect the possession of the firm."

The only language of this judgment that can be considered to be applicable in the present case is that of Lord Denman, as follows:—

"If partners take a shop for that purpose" (i.e., "to carry on their business"), "though one only should act, yet both are liable for the use of it."

This is precisely the principle laid down in the first mentioned case in 22 Beav.; and does not assist the plaintiff here, where no use was made of the premises.

Did the result I have arrived at depend upon the production of the articles of partnership, which were not in evidence at the trial, but were produced before us and shewed the partnership to be one at will, in view of the reasonable conduct of counsel for the respondent consenting to them being read without strict proof, I should be inclined to limit the successful defendant to only half the costs of this appeal; but, it being clearly the duty of the plaintiff to establish the liability of the non-acting partners, where the firm has not accepted the leased premises, either by the articles of

partnership or otherwise, I can see no reason why the appellants should not have their full costs of appeal.

The appeal of the firm and of Hodgins should be allowed with costs and the action as against them dismissed with costs.

*Appeal allowed.*

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[APPELLATE DIVISION.]

CITY OF OTTAWA v. KEMP.

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July 6.

*Assessment and Taxes—Income Tax—Action for—Removal of Defendant from Municipality in November, 1929—Assessment of Defendant in 1930 Based on Assessment Roll of 1929—Assessment Amendment Act, 1930, 20 Geo. V. ch. 46, sec. 3—Whether Retroactive—Municipal Amendment Act, 1930, sec. 12—Effect of.*

The plaintiff corporation sued the defendant for income tax levied on her in 1930, based on an assessment roll prepared in 1929 and completed and returned by the assessor on the 20th September, 1929, at which time the defendant was residing in Ottawa. On the 8th November, 1929, she removed from Ottawa, and has not since resided there:—

*Held*, that from the 8th November, 1929, until the 3rd April, 1930, the defendant had a vested right to freedom from municipal taxation in Ottawa for 1930, and the Assessment Amendment Act of 1930, 20 Geo. V. ch. 46, which came into force on the 3rd April, 1930, was not retroactive so as effectively to cancel and destroy the defendant's vested right.

The Municipal Amendment Act, 1930, 20 Geo. V. ch. 44, sec. 12, gives the council power to "levy on the whole ratable property according to the last revised assessment roll," but that Act did not come into force till the 3rd April, 1930, and it contains no clause making it effective from the 1st January, 1930. Therefore, when the city by-law was passed in January or February, 1930, levying the tax on this defendant, the plaintiff corporation had no power to tax her, and the levying by-law as to her was invalid.

*Sifton v. City of Toronto*, [1929] S.C.R. 484, applied and followed.

An appeal by the plaintiff corporation from the judgment of the First Division Court of the County of Carleton (DALY, Co. C.J.), dismissing an action brought to recover \$184.34 income tax for the year 1930 charged against the defendant, who resided in Ottawa in 1929 and was assessed in that year upon her income for 1928 upon an assessment roll prepared for taxation in 1930 under sec. 60 of the Assessment Act, R.S.O. 1927, ch. 238. She removed from Ottawa on the 8th November, 1929, and was not a resident of Ottawa in 1930, when the tax was imposed.

June 18. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTERN, and ORDE, J.J.A.

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*F. B. Proctor*, K.C., for the appellant corporation, contended that subsec. 3 of sec. 98 of the Assessment Act, as enacted by the Assessment Amendment Act, 1930, sec. 3, subsec. 7, and sec. 12 of the Municipal Amendment Act, 1930, rendered *Sifton v. City of Toronto*, [1929] S.C.R. 484, no longer of authority, and that it is not now open to a person assessed for income to dispute payment of the tax on the ground that he was not a resident of the municipality in the year in which the tax was imposed. The revised assessment roll is now conclusive upon the fact of residence. *Kemp v. City of Toronto* (1930), 65 O.L.R. 423, and the recent decision of this Court in *Re National Trust Co. Ltd. and City of Toronto (Fudger Case)* (1931), ante 496, are distinguishable. The amendment to the Assessment Act is declared to have been in effect on and from the 1st January, 1930, and therefore applied in respect of any municipal income or business tax imposed in that year, whether the assessment roll upon which such tax was based had been revised prior to the 1st January, 1930, or not. It may be that the effect of the amendment has been to preclude any person properly entered upon an assessment roll for income or business tax, and who subsequently becomes a non-resident, from appealing against such assessment, if his removal takes place after the expiry of the time allowed for entering an appeal. If so, there is no injustice, as such person is properly taxable in respect of such income or business assessment. The fact that the defendant was assessed for income tax in 1930 in another municipality is immaterial, as such assessment was based upon the income received during 1929, the year following that in respect of which the assessment was made in the plaintiff municipality.

*J. L. Kemp*, for the defendant, respondent, contended that from the 8th November, 1929, till the 3rd April, 1930, the defendant had a vested right to freedom from taxation in Ottawa for 1930. The Assessment Amendment Act of 1930 is not retroactive so as to destroy this vested right. Its effect only goes back to the 1st January, 1930; see sec. 3, subsec. 9. The defendant, having removed from Ottawa before the rate was levied, could only be made taxable by the statute of 1930. But this does not make her taxable. Reference to *Sifton v. City of Toronto*, [1929] S.C.R. 484; *Kemp v. City of Toronto*, 65 O.L.R. 423; *Re National Trust Co. Ltd. and City of Toronto (Fudger Case)*, ante 496; *Bradford Union Guardians v. Clerk of the Peace for Wilts* (1868), L.R. 3 Q.B. 604.

July 6. MASTEN, J.A.:—Appeal from the judgment of the First Division Court of Carleton, dated the 14th April, 1931. App. Div.  
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The plaintiff corporation sues the defendant for \$184.34 income tax and penalty, being a tax levied on her in the year 1930. The trial Judge dismissed the action, and the plaintiff appeals. CITY OF  
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The tax in question is based on an assessment roll prepared in 1929, which assessment roll was completed and returned by the assessor on the 20th September, 1929, and the time (14 days) for appeal to the Court of Revision from the assessment expired on the 30th September, 1929. Masten, J.A.

As the defendant was residing in Ottawa at the time, no objection to the assessment as returned could be raised by the defendant, and there was in fact no appeal to the Court of Revision. No objection to the assessment nor any application to amend the roll was presented by the defendant or made by the assessing authorities at any time.

On the 8th November, 1929, the defendant removed from Ottawa and has since resided at Rockcliffe, and she now contends that from and after that date the entry of her name on the assessment roll was nugatory and void, and that the tax in question, being based on it, is invalid.

Some time in the early part of 1930 the Municipal Council of Ottawa adopted the roll which had been prepared in 1929 as the assessment upon which the rates of taxation for 1930 should be based and levied. The defendant's name not having been eliminated from the roll, the tax in question was levied against her, and the appellant seeks, in this action, to recover it. The appellant relies on the Assessment Amendment Act of 1930, 20 Geo. V. ch. 46, sec. 3, subssecs. 7 and 9, which read as follows:—

“(7) Subsection 3 of section 98 of the Assessment Act is repealed and the following substituted therefor:—

“(3) Notwithstanding any provision of the Municipal Act and subject to the provisions of section 121 every person assessed in respect of business or income upon any assessment roll which has been revised by the court of revision or county judge shall be liable for any rates which may be levied upon such assessment roll notwithstanding the death or removal from the municipality of the person assessed and notwithstanding that such rates are not levied until the year following that in which the assessment roll was revised.

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“(9) This section shall be read and construed as having effect on and from the 1st day of January, 1930, except as to any action or litigation now pending.”

The appellant alleges that the defendant is a person who was legally assessed in respect of income; whose name was duly entered on the assessment roll which was revised and finally settled in 1929; and which, subsequent to the 1st January, 1930, was adopted by the Municipal Council of Ottawa as the basis of taxation for 1930. The appellant further contends that, though the Act of 1930 came into force only on the 3rd April, yet, by force of subsec. 9 above quoted, subsec. 7 related back to the 1st January, and empowered the council, by its by-law passed after that date, to levy this tax.

The case of *Sifton v. City of Toronto*, [1929] S.C.R. 484, as followed and applied by this Court in the *Kemp* case, 65 O.L.R. 423, in the *Fudger* case, *ante* 496, and by Rose, C.J., in *City of Toronto v. Powell* (1931), *ante* 172, affirmed *ante* 495, makes it plain that in January or February, 1930, when the roll of 1929 was adopted and the rate levied, the Municipal Council of Ottawa had no authority to levy the tax in question on the defendant. If such authority was ever acquired by the plaintiff, it arose from the passage of the Act of 1930, which came into force on the 3rd April, 1930.

In the case of *Sifton v. City of Toronto*, [1929] 65 O.L.R. 397, Sifton had removed from the municipality of Toronto during the year preceding that in which the tax was levied. He paid the tax under protest and sued for its recovery. At p. 403 Magee, J.A., discussing the validity of the assessment, says:—

“What was intended by the Legislature was that the city council might adopt the roll instead of making a fresh assessment against those persons or properties liable to pay, but took the risk of invalidity of the roll of 1923 as against persons whom it could not assess—who might be dead or in China. That there was no appeal to the Court of Revision after such adoption made in fact no difference. In *Nickle v. Douglas* (1875), 37 U.C.R. 51, it was held that no appeal was necessary where there was no right to assess.”

In *Re Kemp and City of Toronto*, 65 O.L.R. 423, it was said in this Court, at p. 435, “If non-taxability develops before the assessment roll is completed and settled the name or the property

should not appear on the roll," referring to *Re Bayack* (1929), 64 O.L.R. 14. App. Div.

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In *Sifton v. City of Toronto*, [1929] S.C.R. 484, Smith, J., reading the judgment of the Court, says, at p. 488:—

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"It is contended, however, that, notwithstanding these sections, the added subsection (3) of the statute of 1917, quoted above, gives the city council power to collect from the appellant a tax on his income of 1924." KEMP.  
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"I agree with the view expressed by Hodgins, J.A., in the Appellate Division that this subsection only applies to rates properly assessable, and cannot apply to rates levied on an income not assessable at all, as in this case."

For the purpose and in the aspect now under consideration, I think that subsec. 7 of sec. 3 above quoted does not differ from the section there under consideration by Smith, J., and that the interpretation there adopted applies in this case.

In *Gardner v. Lucas* (1878), 3 App. Cas. 582, 603, Lord Blackburn, dealing with the presumption against taking away a vested right, stated the rule of law in the following way with regard to the effect of a statute upon a transaction past and closed, where the effect would be to alter a transaction already entered into. "Where," said he, "the effect would be to . . . make that valid which was previously invalid—to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *primâ facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to shew that is not the case."

In Craies' Statute Law, 4th ed. of Harcastle, p. 109, it is said:—

"Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes:—(1) Imposing a tax or charge," citing *Oriental Bank v. Wright* (1880), 5 App. Cas. 842; 856; *In re Micklethwait* (1855), 11 Ex. 452, 456; and *Partington v. Attorney-General* (1869), L.R. 4 H.L. 100, 122.

"(2) Conferring or taking away legal rights, whether public or private;" citing *In re Cuno* (1889), 43 Ch. D. 12, at p. 17; *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178, at p. 189. Maxwell, 6th ed., is to the like effect at pp. 501-504.

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In *Bradford Union Guardians v. Clerk of the Peace for Wilts*, L.R. 3 Q.B. 604, Cockburn, C.J., discussing the imposition of rates, says (p. 616) that the principle was adopted long ago, and has been long acted upon, that, if the language of the statute is *primâ facie* prospective, "the rate must be prospective and not retrospective, so that the expenses shall fall on the ratepayers who are ratepayers at the moment of the expenses being incurred. Consequently," he added, "whenever the Legislature has thought it expedient to authorise the making of retrospective rates . . . it has fixed the period as to which the rate . . . may be retrospectively made."

Applying these rules and principles to the facts of this case, it appears that from the 8th November, 1929, until the 3rd April, 1930, the defendant had an unquestionable vested right to freedom from municipal taxation in Ottawa for the year 1930, and the only question to be determined on this appeal is whether the Act of 1930, as above quoted, is retroactive so as to cancel and destroy effectively the defendant's vested right which had accrued to her in the preceding November. To state the question in that way is almost enough to afford the answer.

But an analysis of the words of subsec. 9, on which the appellant relies, seems to me to make the matter quite plain. Those words are: "This section shall be read and construed as having effect on and from the 1st day of January, 1930." To that date its effect must be strictly limited. It cannot be held to have effect on the 31st December, 1929, or at any earlier date.

It is true that the action of the council in passing the by-law to levy the tax in question was taken after the 1st January, 1930. But, if the appellant's contention were to prevail, subsec. 7, above quoted, would be given an effect at a date anterior to the 1st January, 1930, so as to destroy the vested right which accrued to the defendant on the 8th November, 1929.

The questions raised on this appeal may be viewed in another aspect. In the *Kemp* case, this Court held that the income there in question was not taxable because Kemp had died before any liability for a tax had accrued. So here the defendant, having removed from the Municipality of Ottawa before the rate was levied, is not taxable unless the statutes of 1930 make her taxable. The Municipal Amendment Act, 1930, ch. 44, sec. 12, amplifies the taxing authority of the council and gives it power to "levy on

the whole ratable property according to the last revised assessment roll," but that Act did not come into force till the 3rd April, 1930, and it contains no clauses like subsec. 9 of sec. 3 of the Assessment Amendment Act, 1930, making it effective as from the 1st January, 1930. Therefore, when the by-law was passed in January or February, 1930, levying the tax in question on this defendant, the appellant had no power to tax her, and the levying by-law, so far as it relates to the defendant, was invalid. Subsection 3 of sec. 98, as enacted by the Act of 1930, cannot, for reasons already stated, operate to validate the prior act of the council and deprive the defendant of vested rights acquired anterior to the 1st January, 1930.

I would dismiss the appeal with costs.

LATCHFORD, C.J., and RIDDELL and ORDE, JJ.A., agreed in the result.

*Appeal dismissed.*

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[KELLY, J.]

BROWN v. BROWN.

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July 6.

*Trusts and Trustees — Breach of Trust — Disappearance of Securities Deposited in Unsafe Place—Liability of Estate of Deceased Trustee —Co-trustee Relieved by Trustee Act, secs. 32, 35—Acquiescence.*

Trustees for the plaintiffs had in their hands in 1923 a sum of money which they invested in bearer bonds, with interest coupons attached. The trustees were J. B. and E.C.B. The bonds were placed by T.B., a solicitor, the son of J.B., in a vault or safe in the office occupied by T.B. and J.B., to which many persons had access. E.C.B., who was the mother of the plaintiffs, received from T.B. for them interest, representing coupons on the bonds through or from the office occupied by J.B. and T.B. until after J.B.'s death and until July, 1929. Towards the end of 1929 T.B. left Canada; after his departure, a search of the vault in which the bonds had been deposited revealed that they had disappeared. In an action against the sole executrix and sole beneficiary under the will of J.B. and against E.C.B., the evidence did not shew when the bonds disappeared, but did shew that the bonds were in the vault several years after the death of J.B., and that, after the death of J.B., T.B. took control of the bonds and in effect acted as a trustee:—

*Held*, that J.B., who was familiar with the conditions which prevailed in regard to the manner of keeping securities in this vault, and must have known that the safety of the bonds was imperilled, displayed a reckless disregard for their safety, and was recklessly careless whether, in respect of them, he was committing a breach of trust or not; and therefore became liable for a breach of trust committed in his lifetime, and on his death his estate became liable.

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1931. But *held*, that E.C.B. did not acquiesce in the breach, that what occurred was not by reason of her wilful default, and the provisions of the Trustee Act, R.S.O. 1927, ch. 150, secs. 32 and 35, relieved her from liability.  
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AN action to compel the production by the defendants of certain bonds or in the alternative for damages for breach of trust.

The action was tried before KELLY, J., without a jury, at Stratford.

*J. J. Murray*, for the plaintiffs.

*J. C. Makins*, K.C., for the defendant Etheleen Clara Brown.

*G. W. Mason*, K.C., for the other defendants.

July 6. KELLY, J.:—Norman Alister Brown died in 1918, leaving him surviving his widow, the defendant Etheleen Clara Brown, and his only children, the plaintiffs Jack Astel Brown, Edna Eileen Brown, and Dorothy Phyllis Brown, all of whom were under the age of 21 years when this action was begun on the 6th May, 1930. Jack Astel Brown attained 21 years of age on the 11th August, 1930. The defendant Isabella Brown is the widow of John Brown, in his lifetime of the city of Stratford, who died on the 17th October, 1924, and she became sole executrix of his will, probate of which was granted to her on the 13th January, 1925, and is the sole devisee thereunder. Norman Alister Brown was a son of Archibald Brown, of Clifton, England, who died intestate on or about the 26th January, 1922, letters of administration of whose estate were granted in England to his widow, Alice Georgina Brown, on the 15th March, 1922. The three above-named children of Norman Alister Brown became entitled to a share of the estate of Archibald Brown in the hands of Alice Georgina Brown, as administratrix, who held their shares for them; and being desirous of being relieved from that trust, proceedings were instituted and carried through by which the said John Brown and the defendant Etheleen Clara Brown became trustees thereof, or assumed such trust. At that time Etheleen Clara Brown resided in the city of Stratford, where she still resides. Prior to and at the time of his assuming the trust, John Brown carried on in Stratford a business—insurance, conveyancing, etc., it is said—occupying offices in Downie-street. The probate of his will describes him as a broker. In and prior to 1923 and for some years afterwards John Brown's

son, Tom Brown, practised his profession as a lawyer in these same offices in Downie-street. In 1922, when it was proposed that two persons should be appointed as trustees of the moneys to which Norman Alister Brown's children were entitled, the defendant Etheleen Clara Brown suggested John Brown as one of them. They were not related to each other, but she apparently knew and had confidence in him. She had been given to understand that he was an authorised trustee appointed by the Government of the Dominion of Canada. A letter of hers to him of the 24th August, 1922, was prepared by Tom Brown and signed by her and left with him. John Brown replied thereto by letter of the 25th August, 1922 (exhibit 13), agreeing to become trustee, and stating that he was appointed by the Government of the Dominion of Canada as an authorised trustee, and was under bond to the extent of \$15,000; this letter also was prepared by Tom Brown. Later on, when papers came from England for signature by, or for attention of, these trustees or proposed trustees, John Brown's directions or request to Etheleen Clara Brown were to take them to Tom Brown, who would attend to them for him.

In August, 1923, a draft for £1,641 2s. 5d. came from England, representing the capital of the share of Norman Alister Brown's children in the estate of Archibald Brown; and also a cheque for £22 7s. 2d. interest which had been earned on that share. John Brown's instructions to Etheleen Clara Brown were then also to take these papers (the draft, cheque, etc.) to Tom Brown, who would do the business for him. Accordingly the draft and cheque were endorsed and left with Tom Brown, who, on the 1st August, 1923, deposited the draft to his own credit in the Stratford branch of the Bank of Montreal, realising \$7,651.72 (see exhibits 7 and 8). The proceeds of the £22 7s. 2d. cheque have not been accounted for; they are not included in the present claim. A few days afterwards Tom Brown, from or through a firm of brokers in Toronto, purchased \$7,500 of Canadian National Railway Company 5 per cent. bearer bonds (seven bonds of \$1,000 each and one of \$500) with interest coupons attached, paying therefor \$7,395.72. When the bonds reached Tom Brown, he advised Etheleen Clara Brown thereof; and at his office he shewed them to her; she counted them and saw that they were bearer bonds. She proposed to Tom Brown that the bonds be taken to a bank and placed in

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a safety deposit box. His reply was that it was not necessary, as they had in that office a vault or safe, and the charge therefor and for collecting the coupons would be 5 per cent. of the amount of the interest. He went into the vault and brought from it the envelope in which the bonds were kept (now exhibit 10); while this was going on, John Brown, who was aware of her presence, was in the outer office but not taking an active part in what was being done. The vault opened into the office used by Tom Brown, which adjoined John Brown's office.

Etheleen Clara Brown never afterwards saw the bonds. The key of the deposit box was not given to her; she never had one; she cut none of the coupons; but until July, 1929, she received interest representing coupons on the bonds (less the 5 per cent.) through or from the offices which until John Brown's death he and Tom Brown occupied and with which after John Brown's death Tom Brown was connected. In that interval the \$500 bond was sold, and the proceeds went to Etheleen Clara Brown on behalf of the children.

In or about the latter part of 1929 Tom Brown left Stratford and Canada; after his departure, a search of the vault in which the bonds had been deposited revealed that they had disappeared, the envelope (exhibit 10) in which they had been kept in the vault, and which had been shewn to Etheleen Clara Brown soon after the purchase of the bonds, was still there and is now produced.

In this action the plaintiffs claim:—

(1) Production of the bonds or their equivalent in trustee securities.

(2) In the alternative \$7,000 for breach of trust.

(3) An order charging John Brown's estate in the hands of Isabella Brown, as executor thereof or beneficiary, with payment of that sum.

(4) Interest from the time the last interest was paid.

On the opening of the trial a motion was made on behalf of the plaintiffs to amend the statement of claim by adding this paragraph:—

"9(a). The said John Brown, while remaining in exclusive control of the said bonds as between himself and his co-trustee, delegated the carrying out of the trust and the control and possession of the trust property to one Tom Brown, a solicitor, and left the said bonds in an unsafe place."

That application should be and is granted. A motion was made on behalf of Etheleen Clara Brown that in para. 4 of her statement of defence the word "her" be struck out and "a" substituted. That also I allow.

For the better understanding of the situation there are these further facts: John Brown was fully aware of the nature and extent of the trusts he assumed in respect of the moneys now concerned and his obligations and duty towards the *cestuis que trust* thereof, and through the correspondence and the documents which led up to his appointment and otherwise he had every opportunity of knowing and appreciating what his duties and responsibilities were. He and his son Tom Brown occupying adjoining rooms separated only by a glass partition and using the office vault, it is impossible to conceive or assume that he was not familiar with it and the accommodation it provided and the mode and practice in use in renting space or deposit boxes therein. It was the practice to rent, to outsiders, or customers, separate boxes therein for the exclusive use of those renting. For each of these boxes there was a key; and there was also a master key which was necessary in order to obtain access to the boxes. This master key and the keys of the rented boxes were all kept hanging in the vault. The office staff had access to the vault. Box-renters were at liberty to go unaccompanied to their boxes in the vault and had access to all the keys there hanging; so that any of the persons so having access to the vault could also obtain access to any of the boxes the keys of which were so kept in the vault. Dorothy Dutton, who from 1920 until the time of Tom Brown's departure was a member of the office staff, spoke definitely of these conditions; she was familiar with them. These conditions prevailed when Etheleen Clara Brown requested Tom Brown to take the bonds to a bank for deposit there, and when, refusing her request, he informed her that there was a proper safe in the Brown office.

Etheleen Clara Brown does not appear to have been accustomed to business at the time; while, on the other hand, in the documents (letters, affidavit, etc.) which were prepared by Tom Brown and some of which were signed by John Brown, it was set forth, indeed emphasised, that John Brown was an authorised trustee appointed by the Government of Canada. It is fair to assume that if he held such office it would be an additional reason for his knowing and understanding the obligations and duties incident to a trustee-

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ship such as he assumed of the money of Norman Alister Brown's children. The evidence does not shew when the bonds disappeared or when taken from the Brown vault, or whether that happened before or after John Brown's death.

On behalf of the defendant Isabella Brown several defences have been urged: that, it not being shewn that the bonds disappeared in John Brown's lifetime, liability cannot attach to his estate; that on John Brown's death the trusteeship devolved solely upon the surviving trustee; and that Etheleen Clara Brown as such survivor transacted the business of the trust with Tom Brown, there being evidence that after John Brown's death she asked Tom Brown if it were necessary that a new trustee should be appointed, and that she left the bonds in his possession, not looking to John Brown's estate or to Isabella Brown. This latter argument seems not to have taken into account that it was the infants who stood to lose by any failure in the performance of the duties of the trusteeship, and that if John Brown committed a breach of trust it was not for the co-trustee to relieve him or his estate from the consequences thereof to the detriment of the infant *cestuis que trust*; and it is urged that in any event John Brown's estate (and the beneficiary thereof) is protected by the provisions of the Trustee Act, R.S.O. 1927, ch. 150, especially secs. 32 and 35.

The law as to liability of a trustee, and of his estate after his death, is summarised in vol. 28 of Halsbury's Laws of England. I refer particularly to the following:—

Paragraph 251, p. 115: "The office of trustee terminates on his death, but his estate may remain subject to liabilities incurred during his trusteeship."

Paragraph 372, p. 184: "Any act by a trustee in reference to the trust property in contravention of the duties imposed on him by the trust, or in excess of those duties, and any neglect or omission on his part to fulfil those duties, and the concurrence or acquiescence by one of several trustees in a similar act, neglect, or omission on the part of a co-trustee constitutes a breach of trust; and if such breach of trust entails a loss on the trust estate, the trustee, and, after his decease or bankruptcy, the trustee's estate, are, as a general rule, liable. A trustee may, however, be relieved from such liability by the provisions of the instrument creating the trust or by statute . . . . A mere error of judgment does not in itself constitute a breach of trust."

Paragraph 259, p. 119: "A trustee must not connive at or knowingly facilitate any act or conduct of another person which would involve a breach of trust or occasion loss or risk to the trust property."

Paragraph 260, p. 120: "A trustee is bound to execute the trust with fidelity and reasonable diligence, and ought to conduct its affairs in the same manner as an ordinary prudent man of business would conduct his own affairs."

Paragraph 262, p. 122: "If he leave a trust matter to a co-trustee or employs an agent, he remains liable to his *cestui que trust* for the acts and conduct of the co-trustee or agent, except so far as the law allows him to transact the affairs of the trust through a co-trustee or responsible agent" (in this connection citing *In re Speight, Speight v. Gaunt* (1883), 22 Ch. D. 727 (C.A.), affirmed in 9 App. Cas. 1).

I may be permitted here to refer to some of the decisions which define the duties of trustees and their responsibilities to their *cestuis que trust*.

In *Lander v. Weston* (1855), 3 Drew. 389, trustees of stock sold it, and lent the money to the tenant for life on improper security. One of them died, and the survivor received the money lent, and invested it in a different security, and shortly afterwards sold it out, and again lent it to the tenant for life; and the fund was lost:— *Held*, that the original breach of trust was not cured, and the estate of the deceased trustee was liable for the whole fund.

In *Gibbins v. Taylor* (1856), 22 Beav. 344, the testator directed his executors and trustees (A. and B.) to convert his estate and invest the proceeds on mortgage or in Government securities; they deposited the proceeds in a bank, at interest, in their joint names. A. died and B. drew out the money and applied it to his own use. No sufficient reason being shewn for retaining the money in the bank: *Held*, that A.'s estate was liable to make good the loss.

In *Devaynes v. Robinson* (1857), 24 Beav. 86, the testator died in 1841, having directed his trustees to sell his real estate, and giving them some discretion therein. Instead of selling, they mortgaged, and retained the estate. It was held that they committed a breach of trust, and, the estate having become depreciated, that they were liable for the loss. *Held*, also, that where a loss occasioned by a breach of trust does not happen until after the death of the trustee, his assets are equally liable. At p. 95 Lord

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Romilly, M.R., said: "I cannot accede to the view, that if a trustee commit a breach of trust, and the consequences of it do not occur until after his death, his estate is not to be made liable, because, if redress had been sought in respect of that breach of trust, it was reparable during his lifetime. It is admitted that such would be the rule with respect to an active breach of trust, as if a trustee did an act by which he placed the trust money in an improper investment: even although the loss might not have been sustained during his lifetime, still, if the consequences of that act were a total loss after his death, his estate would be then liable . . . . But if the breach of trust arises from the trustee doing no act at all, it would equally be one for which his estate would be liable to make good the loss thereby occasioned . . . . I do not rest the case on any doctrine peculiarly applicable to wilful default, but on this: that it was part of the duty which the trustee or executor had undertaken to perform, and that he was bound to perform every part of the trust which he had undertaken."

The head-note in *Field v. Field*, [1894] 1 Ch. 425, is this: "Where a trust fund had been invested on a mortgage of a building estate, the development of which would involve frequent reference to the title-deeds, the trustees were held justified in depositing the deeds with their solicitor, instead of retaining them under their own exclusive joint control in a bank or elsewhere. *Seemle*, convertible securities, such as bonds payable to bearer, belonging to a trust, ought not as a general rule to be left in the custody of a solicitor or agent." At p. 430 Kekewich, J. (having first referred to the custody of deeds), said: "With regard to bonds and certificates payable to bearer, I have not the slightest doubt that they ought not to be under the control of a solicitor, or any other agent. The trustees are responsible for them, and they must keep them, not necessarily in their own custody, but in some place where they cannot be got at without the consent of the whole body."

*In re De Pothonier, Dent v. De Pothonier*, [1900] 2 Ch. 529, the head-note is this: "Where trustees are expressly authorised to retain or invest in convertible securities, such as bonds transferable by delivery with coupons attached, they may deal with them in the way usual with prudent men of business, and may deposit them in their joint names with the bankers to the trust upon a simple acknowledgment by the bankers of the receipt thereof." In his reasons for judgment Cozens-Hardy, J., said, at p. 532: "The

law does not impose upon trustees more than the exercise of that ordinary care and diligence which a competent and prudent man of business would exercise in his own affairs: that is settled by *Speight v. Gaunt*. . . . It is the ordinary usage of bankers, with whom bonds of this nature are deposited, to discharge the duty of cutting off the coupons when due, collecting them, and placing the amount to the credit of the customer's account. I think the trustees would be perfectly justified in depositing the bonds with the bankers upon those terms, which will not justify the bankers in parting with the bonds except under the authority of all the trustees, but will justify the bankers in cutting off the coupons and collecting them as and when they are due, in the ordinary course. This seems to be entirely in the spirit of, if not sanctioned by, the express language of Wood, V.-C., in *Mendes v. Guedalla* (1861), 2 J. & H. 259, 134 R.R. 213, and I do not think that Kekewich, J., in *Field v. Field* really intended to depart from that." He goes on to say that Kekewich, J., in the latter case was directing his mind to the question whether trustees ought to allow bonds of this nature to remain in the hands of a solicitor, and he adds: "That I should unhesitatingly answer in the negative. It is no part of a solicitor's duty to cut off these coupons and collect them, while it is part of the duty of the banker."

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The Trustee Act, R.S.O. 1927, ch. 150, on which the defendant Isabella Brown relies, goes a great distance in relieving a trustee from liability in cases to which it applies; but, on the other hand, there are cases in which the conduct of a trustee, the manner of his performance of his duties, or his failure to perform them, or the negligent manner in which he performs them, disentitles him to the protection and relief which the Act would otherwise give him. In any particular case the Court must find a line of demarcation between the two classes, so as to determine whether the Act can successfully be invoked in favour of a trustee.

This aspect of a trustee's liability was discussed in a very recent case, *In re Vickery, Vickery v. Stephens*, [1931] 1 Ch. 572, in which reference is made to the English Trustee Act, 1925, ch. 19. The language of sec. 30 of that Act is identical with that of sec. 32 of the Ontario Trustee Act, relieving a trustee from answerability and accountability for his own acts, receipts, neglects, or defaults, in the circumstances there set out, unless the same happen through his own wilful default. The *Vickery* case followed *In re City*

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*Equitable Fire Insurance Co.*, [1925] Ch. 407, in which it was held that an act, or an omission to do an act, is wilful where the person who acts, or omits to act, knows what he is doing and intends to do what he is doing, but if that act or omission amounts to a breach of that person's duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing, and intends to commit, a breach of his duty, or is *recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty*; or, as Romer, J., put it, that a person is not guilty of wilful neglect or default unless he is conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is *recklessly careless whether it is a breach of his duty or not*.

I am convinced, and I find, that John Brown, who was familiar with the conditions which prevailed in regard to the manner of keeping securities in this vault, and must have known, unless he deliberately closed his senses against such knowledge, that the safety of the bonds was in danger, displayed a reckless disregard for their safety, and that he was recklessly careless whether, in respect of them, he was committing a breach of trust or not; and for the reasons I have stated and on the authorities to which I have referred he became liable for a breach of trust committed in his lifetime, and on his death his estate became and it is now liable.

The plea based on alleged acquiescence by the defendant Ethleen Clara Brown cannot prevail. Lord Chancellor Cranworth in *Burrows v. Walls* (1855), 5 DeG. M. & G. 233, at p. 252, defines acquiescence as "a consent on the part of the persons who have the right to call the trustees to account, that they shall be absolved from liability, and that they will adopt the misapplication of the funds, as having been done under their assent and sanction." There was no such acquiescence here. A perusal of the reasons for the judgment in that case is instructive.

The defendant Isabella Brown's plea of the Statute of Limitations cannot avail in the circumstances. See *Stone v. Stone* (1869), L.R. 5 Ch. 74; and *Woodhouse v. Woodhouse* (1869), L.R. 8 Eq. 514.

I find it unnecessary to take into consideration the plaintiffs' allegations of false representation as set out in para. 5 of the statement of claim, the plaintiffs' case being, in my opinion,

sufficiently established (but not, however, against the defendant Etheleen Clara Brown), without taking that into account.

Considering all the evidence and the circumstances in which Etheleen Clara Brown was placed and the part which she took in the dealings with these trust moneys, I have come to the conclusion that what occurred did not happen through her wilful default; and that the provisions of the Trustee Act relieve her from liability; and therefore as against her the action should be dismissed, but without costs.

There will be judgment for \$7,000 and interest from the 30th July, 1929, against the defendant representing the estate of John Brown, with costs.

NOTE:—Since the foregoing reasons were written, my attention has been drawn to the particulars dated the 20th October, 1930, delivered by the plaintiffs (pursuant to a demand on behalf of the defendant Isabella Brown) wherein it is stated (contrary to a statement of mine) that it was after the death of John Brown that Tom Brown took control of the bonds and the trusteeship. It is also now submitted that the evidence of Scott, a defence witness, shews that the bonds were in the vault several years after John Brown's death. These circumstances, however, do not alter the conclusion I had already reached that John Brown's breach of trust for which I have held his estate liable continued and was not cured by what is shewn to have happened afterwards.

If the bonds were in the vault until after John Brown's death, they were there, so far as the evidence shews, under the same conditions and in the same danger as existed at and following their being placed in the vault.

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# BULLAS V. EMPIRE LIFE INSURANCE CO.

*Insurance (Life and Accident)—Total and Permanent Disability Allowances—Self-inflicted Injuries with Knowing Design and Intent—Insurance Act, 1924, 14 Geo. V. ch. 50, secs. 177 (2), 179—Insurance Act, 1928, 18 Geo. V. ch. 35—Non-retroactivity—Incontestability Clauses of Policies—Public Policy.*

By two policies issued in 1926 by an insurance company, the liabilities of which, including the disability benefits payable under the two policies, were assumed by the defendant company, the plaintiff, then 41 years of age, was insured on the plan described as ordinary whole life (endowment at age 85), the sum assured being a monthly income

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to his wife. Attached to the policies were total and permanent disability clauses by which (among other things) loss of sight of both eyes was declared to constitute total and permanent disability. There was also in both policies a provision for double indemnity in case of death from accident. The disability and indemnity provisions were admittedly part of the contract. Each of the policies contained, as privileges or conditions, provisions that they should be incontestable after one year from the date of issue, provided that premiums had been duly paid, and that self-destruction, sane or insane, within two years from the date of issue, was a risk not assumed by the company under the policies. The statutory provisions applicable to life, accident, and sickness insurance, when the policies were issued, are found in the Ontario Insurance Act, 14 Geo. V. ch. 50, as amended by 15 Geo. V. ch. 54. The plaintiff met with his injuries by reason of his own act on the 21st September, 1929, when he shot himself, and thereby permanently lost the sight of both eyes:—

*Held*, in an action to recover permanent disability allowances, that the amendments made to the Insurance Act subsequent to the year 1926 were not retroactive and did not take away contractual rights acquired under legislation in force when the contracts were entered into.

And *held*, upon the evidence, and having regard to the provisions of secs. 177(2) and 179 of the Act of 1924, and also upon grounds of public policy, that the plaintiff could not succeed.

AN action upon a policy of life and accident insurance.

The action was tried by KELLY, J., without a jury, at Kitchener.

*H. J. Sims*, K.C., and *G. Bray*, K.C., for the plaintiff.

*Casey Wood*, K.C., and *G. M. Jarvis*, for the defendant company.

July 10. KELLY, J.:—On the 8th March, 1926, the Commonwealth Life and Accident Insurance Company, for the premium consideration therein named, issued policy No. 5006 to the plaintiff, then 41 years of age, on the plan therein described as ordinary whole life (endowment at age 85), “the sum assured” being a monthly income as therein set forth, payable to his wife Lovina M. Bullas. Attached to the policy are total and permanent disability clauses by which (amongst other things) loss of sight of both eyes is declared to constitute total and permanent disability. There is also a provision for double indemnity in case of death from accident. The total and permanent disability provisions and the double indemnity provisions are both admittedly part of the contract. On the 3rd April, 1926, the same company issued to the plaintiff policy No. 4065, containing substantially the same terms as above set forth. It is admitted in the pleadings that in October,

1929, the Commonwealth Life and Accident Insurance Company conveyed all its assets to the defendant company, the latter assuming all liabilities of the former, including the disability benefits payable under the said two policies.

The plaintiff alleges that on the 21st September, 1929, he permanently lost the sight of both eyes as the result of bodily injury and thereby became totally and permanently disabled within the meaning of the above disability provisions. He claims disability benefits at the rate of \$200 a month from the 6th May, 1930, until judgment, together with interest, and a refund of \$83.70 for instalments of premium which he says he paid subsequent to the receipt by the defendant company of proof of disability, and he asks a declaration that he is entitled to payment of these monthly disability annuities for the remainder of his life at the rate of \$200 a month.

In its statement of defence the defendant company alleges: (1) that the plaintiff destroyed his sight by discharging with his own hand a bullet from a revolver or other firearm into his head in an attempt to commit suicide; (2) in the alternative that his disability was created by his own voluntary act; (3) in the further alternative that the disability was not occasioned by external force or agency and did not happen without the direct intent of the plaintiff or as the indirect result of his intentional act; and (4) that further in the alternative the disability happened by design of the plaintiff; and it pleads the Ontario Insurance Act, 1924, 14 Geo. V. ch. 50, and particularly secs. 177 and 179 thereof.

At the close of the plaintiff's cross-examination at the trial the defendant company's counsel applied to amend the statement of defence, because of information which had come from certain other policies of insurance on the plaintiff's life which were introduced during his examination in chief, the proposed amendment being as follows:—

"1A. The defendant says that the policies referred to in the statement of claim were issued upon applications made therefor and signed by the plaintiff, that the said applications contained statements which to the knowledge of the plaintiff were false and fraudulent in respect of matters material to the risk, in that the father and the deceased sister of the plaintiff had suffered from insanity, and that the said sister committed suicide, contrary to the statements made in the said applications, and that the said

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policies were and are void; and in the alternative pleads the subsequent clauses thereof."

I reserved the application and permitted the plaintiff's counsel to file an amendment to his reply, which he did in the following form:—

"(1) By way of reply to the statement of defence and particularly paragraph 1A. thereof the plaintiff denies specifically the allegations therein, and says that the statements in the applications referred to were true in fact and made by the plaintiff in the honest belief of their truth.

"(2) The plaintiff further says that such statements are not material to the contract contained in the said policies.

"(3) The plaintiff further pleads thereto that, by the terms of the contracts contained in said policies, such contracts are incontestable after one year save only for non-payment of premiums."

I have allowed both of these amendments.

Each of the policies sued upon contains these privileges and conditions:—

"(1) Incontestability. This policy shall be incontestable after one year from the date of issue provided premiums have been duly paid subject to the provisions of clause (5) respecting age of the insured.

"(9) This policy and the application therefor (copy of which is attached herewith) constitute the entire contract, which cannot be varied nor any of its terms waived except in writing endorsed thereon by the president, general manager, or the secretary of the company at its head office, Hamilton. The statements of the insured in the absence of fraud shall be deemed representations and not warranties, and no such statement shall void the contract unless it is material and contained in the said application.

"Self-destruction, sane or insane, within two years from the date of issue thereof, is a risk not assumed by the company under this policy."

The legislation applicable to life insurance and accident and sickness insurance, in force at the time the plaintiff's said policies were issued, is found in the Ontario Insurance Act, 1924, 14 Geo. V. ch. 50, as amended by 15 Geo. V. ch. 54.

Section 177(2) of 14 Geo. V. ch. 50 is as follows:—

"(2) Every insurer licensed for the transaction of accident or sickness insurance may, within the limits and subject to the restric-

tions prescribed by the licence, insure or reinsure any person against accident, sickness or disability, total or partial, so long as the contingency insured against does not happen by design of the insured."

Section 179 of that Act is this:—

"In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer, shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy."

It is not denied but indeed admitted, and it is otherwise proved, that the plaintiff met with his injuries by his own act. The question is whether that act was committed in such circumstances as not to deprive him of the right to recover upon the policies, and whether the circumstances were such as to debar recovery on the ground of public policy; and, incidentally, questions may arise as to whether he was a responsible agent at the time, and whether he was then sane or insane. At the trial, where he was the only witness called, he told of conditions prior to and leading up to the act on the 21st September, 1929, which caused his injuries; that about April, 1929, he commenced the erection of a building in the city of Kitchener where he resided and carried on business; that during the course of the building operations he had difficulty in financing the project, and, being indebted to others on account of the construction work, his efforts to raise necessary money, or rent space in the building, were unsuccessful; that this condition of things was a source of constant worry and trouble to him. He told of having a hazy recollection of going to his sister's home, a couple of blocks distant, and there getting a revolver and putting it in his pocket, and of there being cartridges loose in the drawer; that he returned to the said building—in which he was then living—and went to the boiler-room in the cellar, but does not know what then happened. His description of his state of mind at that time was that he "did not seem to have faith for anything," a statement suggesting that it was lack of faith or confidence in himself which

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was at the foundation of what led up to and induced his act, and not that he did not know or understand or appreciate what he was doing. He says his first finding out that he had shot himself was when in the hospital his sister told him it would be necessary to have one of his eyes removed. He said also that it was about April or May, 1930, that he first learned that any of his policies contained total disability benefit provisions; and that at the time the policies were issued he had no idea that they contained such provisions, a statement which is difficult of belief, coming from a man accustomed to business and not lacking in intelligence, and who, from having taken out many policies of life insurance, was not inexperienced in such matters.

Though he said he did not know why he got the revolver, he was unable to suggest any other reason than for using it on himself; and, though denying any remembrance of having loaded the revolver, which he said was not loaded when he took it, he accepted the suggestion that nobody but he could have loaded it. Two or three weeks prior to the 21st September—having come to the conclusion that his efforts to arrange a loan to meet his indebtedness for the building gave no promise of success and his financial obligations still worrying him—he says he would drive into the country and try to figure out ways and means of getting the building rented. He has admitted that for many years prior to these occurrences he had been perfectly well, and knows of no predisposition affecting the situation; and that when he did this act he had no disease that he knows of.

Though many of his statements were in answer to questions of a very leading character, his evidence was lacking in candour and was given in a most unsatisfactory and unconvincing manner, and with what appeared to me to be a studied and strained effort to create the impression that the occurrence by which he was injured was beyond his memory or recollection and happened without intent or design or appreciation or understanding of what he was doing. Statements contradictory of one another in his applications for several policies which were put in evidence shew a disregard for the truth in important matters of family history with which he must have been familiar. This also has helped to shake confidence in his evidence. I could not at the close of the trial, and I cannot now after long and thoughtful deliberation, resist the conclusion that his act by which he caused his injuries was with knowing

design and intent, though led up to by worry and anxiety over the condition of his financial affairs. Of all that I entertain no doubt. One cannot but feel sympathy for a fellow-being doomed to permanent total loss of sight, as his condition seems to be; but claims such as the present are not to be granted on grounds of sympathy.

With reference to the above recited sections 177(2) and 179, it was not open to the parties to the two policies in question to contract themselves out of the legislation which was in force at the time of these contracts, by which power was given to an insurer licensed for the transaction of accident or sickness insurance to insure a person against accident, sickness, or disability, the power being confined to cases where the contingency insured against does not happen by design of the insured. The plaintiff's counsel cited *North American Life Assurance Co. v. Elson* (1903), 33 Can. S.C.R. 383, as to the effect of the incontestability clauses in these policies. That case, as also *Nova Scotia Trust Co. v. Mutual Life Insurance Co. of New York*, [1924] 4 D.L.R. 707, also cited, dealt with incontestability clauses as affected by fraud of the insured in obtaining the policies, but not with the question whether the insurance company had any legislative authority or sanction for making the contract or any particular term of it; and so the present case is distinguishable from them. *Manufacturers Life Insurance Co. v. Anctil* (1897), 28 Can. S.C.R. 103, and in the Privy Council *Anctil v. Manufacturers Life Insurance Co.*, [1899] A.C. 604, has more resemblance to the present case. There the action failed because the claimant had no insurable interest, there being a statutory provision that unless there was an insurable interest the policy was void.

The plaintiff's counsel have relied upon and emphasised the amendments made to the Insurance Act subsequent to the year 1926, in which year these policies were issued, taking the position, as I understood them, that, the cause of action not having arisen until September, 1929, the statute as it stood at that time, and not the legislation which was in force when the policies were issued, should prevail. But it must be kept in mind that the amending legislation does not say that it is retroactive, and it does not purport to declare what was the meaning of the sections of the 1924 Act to which I have referred.

The 1928 amendments (18 Geo. V. ch. 35) were not intended to take away contractual rights acquired under legislation in force

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when the contracts were entered into. It is recognised law that a retroactive operation is not to be given to a statute so as to impair an existing right or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If a right has once been acquired by virtue of some statute, it will not be taken away by mere repeal of the statute under which it was acquired. To take it away under such circumstances would be unjust and in derogation of vested rights. It is inconceivable that the Legislature in passing these amendments had any intention of destroying contractual rights already acquired. In the absence of any statement or declaration to the contrary in the amending legislation, I hold that in so far as the present case depends upon legislation it is to be governed and disposed of by the legislation which was in force when the policies were issued, and not under the amended legislation in force at the time the cause of action arose. Notwithstanding this, I would be prepared to say that but for the question arising on the ground of public policy and but for the statutory provisions in force in 1926, particularly sec. 177 of the Insurance Act of 1924, the incontestability clauses would be effective against the defendant company.

The plaintiff's claim is resisted also on the grounds of public policy. Public policy is dealt with in Halsbury's Laws of England, vol. 17, at p. 556, para. 1109, where the statement is made that on grounds of public policy, apart from any express provisions in the policy, the representatives of an assured cannot recover, in the case of his death by felonious suicide, for the same reason that a life policy is not allowed to cover death at the hands of justice; but this doctrine applies only to felonious suicide, and not to suicide by a person when insane.

The subject is also dealt with in *Anctil v. Manufacturers Life Insurance Co.*, *supra*, which originated in the Province of Quebec and was finally disposed of in the Privy Council, [1899] A.C. 604, where it was held that a condition in a policy that the same should, on the lapse of a year or upwards during which premiums have been regularly paid, become incontestable, is no answer to an objection founded on the terms of the Code.

In *Amicable Society v. Bolland* (1830), 4 Bligh N.R. 194 (H.L.), the claimants under a policy of life insurance were held not entitled to recover, upon the ground that the contract was against public policy and must be considered and construed as

if a clause had been inserted in terms insuring against the event of the commission of a capital felony by the party insured. At p. 211 the Lord Chancellor put this proposition: "Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained. Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of these restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connexions."

Decisions of Courts in the United States of America have been cited wherein incontestability clauses have not failed of their effect because of public policy. These cases not being binding on me, I prefer to follow the decisions of the English Courts, believing, as I do, that the principles relating to public policy as enumerated and defined in the text and authorities above cited, and others to the same general effect, are still in force as law.

On the two grounds above cited, (1) the effect of the legislation in force when the policy contracts were made, and (2) upon grounds of public policy, my opinion is that the plaintiff cannot succeed. In that view of the case, I have not thought it necessary further to discuss the additional defence set up in the amendment to the statement of claim.

The action will be dismissed with costs.

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[IN BANKRUPTCY.]

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*Bankruptcy—Goods of Debtor Distrained by Landlord—Claims for Business Taxes and Electricity Supplied—Priorities—Assessment Act, R.S.O. 1927, ch. 238, sec. 112 (11)—"Claimed by"—"Bailiff of any Court."*

The debtor company, before its authorised assignment in bankruptcy, was indebted to its landlord for rent. The landlord distrained for rent, and the debtor's goods on the demised premises were under seizure by the landlord and in its possession when the debtor's assignment became effective, and a custodian was appointed:—  
*Held*, that the landlord was at that time a secured creditor, within the meaning of that expression in the Bankruptcy Act; and the

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custodian, as custodian, never came into possession of the goods under distress for rent.

The city corporation and the Hydro-Electric Commission claimed priority for business taxes and electric service, but no distress was ever levied for the taxes or the service; and, the bankruptcy having intervened, the rights of the corporation and the commission defendant on subsec. 11 of sec. 12 of the Assessment Act, assuming that the property taken by the landlord was liable to seizure for taxes within the terms of sec. 112. The trustee in bankruptcy accepted the appointment of bailiff to the landlord, and, with the approval of the landlord, took possession of the goods, sold them, and held the proceeds as the landlord's bailiff:—

*Held*, that the property never came into the possession of the trustee acting in that capacity; and there was nothing to shew that the trustee claimed them, the words "claimed by" in subsec. 11 meaning "validly claimed" by virtue of a claim which could be made effective in law.

*Held*, also, that the property was not under "seizure" or "attachment," those words not including "distress," and the word "bailiff" in the latter part of the subsection meaning "a bailiff of any court," as mentioned in the earlier part.

The landlord was, therefore, entitled to the proceeds of the distrained goods as against the claimants.

AN application by the trustee in bankruptcy of the property of D. S. Paterson & Co. Ltd. for directions with reference to the conflicting claims of the company's landlord and the Corporation of the City of Toronto and the Toronto Hydro-Electric Commission.

The application was heard by SEDGEWICK, J., sitting in Bankruptcy.

*Fraser Raney*, for the trustee.

*John B. Allen*, for the Oxford University Press, the landlord.

*J. Palmer Kent* and *Herepath*, for the Corporation of the City of Toronto and the Toronto Hydro-Electric Commission.

July 15. SEDGEWICK, J.:—The facts are as follows: The debtor, before the assignment, was indebted to the landlord in a large sum for rent. The landlord distrained for rent, and the debtor's goods on the demised premises were under seizure by the landlord and in the landlord's possession when the debtor's assignment under the Bankruptcy Act became effective, and a custodian was appointed. There is no doubt that the landlord was at that time a secured creditor, within the meaning of that expression in the Bankruptcy Act. It seems to me also that there is no doubt that the custodian, as custodian, never came into possession of the goods under distress for rent. In ordinary circumstances, therefore, the landlord could not be prevented from realising its security as a secured creditor.

The City of Toronto and the Toronto Hydro-Electric Commission, however, claim that they are entitled in priority to the landlord for business taxes owing by the debtor in respect of the demised premises and for electric service supplied to the debtor in those premises.

No distress was ever levied for the taxes or electricity account. I am assuming that the property taken by the landlord is property liable to seizure for taxes within the terms of sec. 112 of the Assessment Act, R.S.O. 1897, ch. 238.

The bankruptcy having intervened, the rights of the city corporation and of the Hydro-Electric Commission depend on subsec. 11 of sec. 112 of the Assessment Act. That subsection is as follows:—

“Where personal property liable to seizure for taxes as hereinbefore provided is under seizure or attachment or has been seized by the sheriff or by a bailiff of any court or is claimed by or in possession of any assignee for the benefit of creditors or liquidator or of any trustee or authorised trustee in bankruptcy or where such property has been converted into cash and is undistributed, it shall be sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator or trustee or authorised trustee in bankruptcy, notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator or trustee or authorised trustee in bankruptcy shall pay the amount of the same to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever.”

In order to succeed against the landlord, the city corporation and the Toronto Hydro-Electric Commission must shew a situation within the conditions prescribed by the subsection just quoted. First, there must be “personal property liable to seizure for taxes” within the meaning of sec. 112. I am inclined to the opinion that this condition existed at the time the authorised trustee became entitled to take possession of the debtor’s property. Second, such personal property must be within the following description, namely, “under seizure or attachment or has been seized by the sheriff or by a bailiff of any court or is claimed by or in possession of any . . . authorised trustee in bankruptcy or where such property has been converted into cash and is undistributed.” It seems quite certain that the property in question never came into the possession of the authorised trustee acting in that capacity. I express the

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situation thus because the trustee accepted the appointment as bailiff to the landlord, and, with the approval of all parties, took possession of the goods, sold them, and holds the proceeds as bailiff of the landlord. The statute, however, applies not only if the goods are in the possession of the trustee, but also if they are *claimed* by the trustee. I have nothing before me to shew that the trustee *claimed* the goods; but, even if the goods were *claimed*, I am satisfied that the words "claimed by" means validly claimed by virtue of a claim which could be made effective in law. The landlord being, by virtue of the distress, a secured creditor with security for its claim on the goods under distress, I do not think the trustee could obtain possession of the goods without paying off the landlord's claim. Therefore, I do not think the goods are goods "claimed by" the trustee within the meaning of the subsection.

Third, is the property in question under seizure or attachment? Counsel for the city corporation argued that these words are separable from the words "by the sheriff or by a bailiff of any court," and are wide enough to cover a landlord's distress for rent. I do not think they are wide enough for the purpose. I think "seizure" and "attachment" are intended to cover exercise of judicial power. "Seize" in Murray's New English Dictionary is "to take possession of (goods) in pursuance of a judicial order." "Attachment," according to the same authority, is "the taking of property into the actual or constructive possession of the judicial power." These words, so defined, do not ordinarily include distress, which, according to Stroud, "is the taking without legal process cattle or goods as a pledge to compel the satisfaction of a demand." Again, if the words are to include distress, I must read the word "bailiff" in the eighth line of the subsection to include a landlord's bailiff. It seems to me to mean only the bailiff referred to in the third line, that is "a bailiff of any court."

If my reasoning is correct, the landlord is entitled to the proceeds of the distrained goods, and the claim of the city corporation and the Hydro-Electric Commission must fail. There will, therefore, be an order to this effect. The costs of the landlord are to be paid by the Corporation of the City of Toronto and the Toronto Hydro-Electric Commission.

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*Will—Construction—Effect of Marriage Contract Made in Province of Quebec—Change of Domicile to Ontario—Misnaming of Legatee—Adopted Son—Bequest to Widow and Step-sons—Whether Class-gift—One-half to Widow and the other to Step-sons—Intention of Testator—Implication.*

The testator, who at the time of his death in November, 1930, resided in Ontario, having made his will in December, 1929, and leaving a wife, to whom he was married in the Province of Quebec in August, 1912, two sons by a former marriage, and an adopted son. His widow had seven children by a former marriage, and was possessed of property in the Province of Quebec. Shortly before their marriage they entered into a marriage contract respecting the holding of their respective properties. Soon after the marriage the wife went with five of her children to the place in Ontario where the husband had theretofore carried on business and she resided with him there until the time of his death. By his will he gave all his estate to his executor in trust, after payment of his debts, etc., to pay \$7,000 to each of his two sons and \$1,000 to his adopted son, naming him as "Hector Grenville," his real name being "Hector Quinville." The balance of his estate was to be divided equally between his step-sons and his wife, all of whom he named, and added: "The above share for my wife is in addition to what the law convey to her that is one-third of the whole estate. And in case some of above children should die that their share be divided equally between my two sons and seven step-sons. All the rest and residue of my estate I devise and bequeath to and to pay my executor \$100 for his service:"—

*Held*, having regard to the legal meaning and effect of the marriage contract shewn by the evidence, and community of property having become dissolved by the death of the testator, the widow became entitled either to accept or renounce the community, and on renouncing it to retake and receive all the property which she brought into the community at the time of the marriage and all that she acquired during the marriage; and, assuming that there was a change of domicile to the Province of Ontario, that her rights in that regard were not affected thereby; and also that she had for herself and her children renounced all rights of dower.

- (2) That the testator, in mentioning in his will "Hector Grenville" as his adopted son, must be taken to have meant "Hector Quinville," and the executor was authorised to pay to the latter the bequest, to the extent to which there were assets, indicated by the testator, or available for that purpose.
- (3) That the bequest to the widow and step-sons was not a class-gift, but one to the step-sons and the widow equally among them, and not one-half to the step-sons and one-half to the widow.

*Bain v. Lescher* (1840), 11 Sim. 397, followed.

- (4) That the testator's intention was that his widow should have the one-third which she would have received had he died intestate, and also the share of the "balance" which was to go to her and the step-sons, but excluding any right to dower, she having renounced that right; and that effect should be given to that intention.

The doctrine of implication considered with reference to the authorities.

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MOTION by the executor of the will of Hector Tremblay, deceased, for an order determining questions arising upon the language of the will and of a marriage settlement created by the testator and his wife while domiciled in the Province of Quebec.

The motion was heard by KELLY, J., in the Weekly Court, Toronto.

*A. C. Heighington*, K.C., for the executor.

*J. M. Macdonnell*, for the testator's children and adopted son.

*Hamilton Cassels*, for the testator's widow and step-sons.

July 16. KELLY, J.:—Hector Tremblay, who at the time of his death resided in the city of Fort William, in the district of Thunder Bay, died on the 4th November, 1930, having made his will bearing date the 23rd December, 1929, probate of which was granted on the 8th January, 1931, to the executor therein named. The testator's first wife died on the 20th June, 1911; she left two children of her marriage with the testator, namely, Arthur Tremblay and Armand Tremblay, both of whom were over 21 years of age at the time of the testator's death.

In the Province of Quebec on the 31st August, 1912, the testator married Adele Tremblay, of that Province, who had seven children by her former marriage, all now over the age of 21 years. The testator left him surviving as his only children the said Arthur Tremblay and Armand Tremblay. He also left him surviving an adopted son, Hector Quinville Tremblay.

At the time of the marriage of Adele Tremblay with the testator she was possessed of property in the Province of Quebec, and on the 25th August, 1912, shortly before the marriage, she entered into a marriage contract with the testator respecting the holding of the property of the two contracting parties. The contract and a verified copy of it form part of the material on this motion. Soon after the marriage, Adele Tremblay went with five of her children to Fort William, and there they took up their residence with the testator, he continuing to carry on there the business in which he had theretofore been engaged. She resided with him there until the time of his death.

By his will, which is inartistically drawn, the testator gave and devised all his estate real and personal to his executor and trustee in trust, after payment of his debts, funeral and testamentary expenses, to dispose of and pay over as he therein directed, namely,

"to pay to my own sons as follows seven thousand dollars to Armand and seven thousand dollars to Arthur and one thousand dollars to Hector Grenville my adopted son. The balance to be divided equally between my step-sons and my wife named as follows Omer, Armand, Euclid C. Joseph, Aimee, Leonel Stephane and my wife Adele Tremblay.

"The above share for my wife is in addition to what the law convey to her that is one third of the whole estate.

"And in case some of above children should die that their share be divided equally between my two sons and seven step-sons.

"All the rest and residue of my estate I devise and bequeath to and to pay my executor one hundred dollars for his service."

The executor now asks the Court to determine the following questions:—

1. To what extent does the marriage settlement made by the deceased and his widow while domiciled in the Province of Quebec affect assets of the deceased situate in Ontario?

2. Is the executor authorised to pay to Hector Quinville Tremblay, the adopted son of the deceased, the \$1,000 bequest to Hector Grenville, described in the will as the adopted son?

3. Is the balance of the estate to be divided between the named step-sons and the widow in proportions of one-half to the step-sons and one-half to the widow or to all equal?

4. Is the widow entitled, in addition to any specific bequests, to one-third of the entire estate, as if the testator had died intestate, or only to her dower or alternatively to her interest under the marriage settlement only?

The law of the Province of Quebec in relation to the said marriage contract and other matters here involved has been stated in the affidavit (part of the material) of Mr. Colville Sinclair, K.C.—counsel for all the parties having agreed that for present purposes his opinion therein given is to be accepted. The most important of the questions there considered and dealt with are (1) the existence of legal community of all property possessed by the contracting parties, (2) the subsistence and continuance of such legal community until dissolved for any of the causes mentioned in the Civil Code, one of which is the death of either of the two parties, (3) the right of the wife upon such dissolution either to accept or renounce it, and (4) the right in law

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for a consort to stipulate that there shall be no dower, such stipulation binding the child as well as the mother.

The evidence as to the legal effect of the marriage contract between these parties is that it is valid. By it Adele Tremblay renounced for herself and her children 'all and any dower and right to dower, customary or prefix. On the testator's death the community of property became dissolved (there is no evidence of its being earlier dissolved for any of the reasons mentioned in the Code), and the widow thus became entitled either to accept or renounce the community, there being no evidence that she had intermeddled in the property. The question is also raised as to the effect of change of domicile upon community of property. In England that was dealt with in *Re De Nicols, De Nicols v. Curlier* (1900), 69 L.J. Ch. 680, where it was held, with reference to the circumstances thereof, that, as to movable goods, the rights of the wife under the French marriage law as to community of goods was not affected by change of domicile (in that case the change being from France to England), and that the widow was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France. Adopting that principle, which seems applicable here, the wife's property-rights under her marriage contract made with the testator in the Province of Quebec, in any event as regards movable property, were not taken away or affected by her change to the Province of Ontario, though defined as declared by Mr. Sinclair's opinion already referred to, to which further reference is made later on. I would go further and say that the principle should and does apply to immovable property in the Province of Quebec, which, necessarily remaining in that Province, was not and is not capable of being removed therefrom as is movable property. Having regard, therefore, to the legal meaning and effect of the contract made between these two parties, in the light of what I have already mentioned, the answer to the first question submitted should be that, community of property having been dissolved by the death of the testator, the widow became entitled to the right either to accept or renounce the community, and on renouncing it to retake and receive all the property which she brought into the community at the time of the marriage, and all that she acquired during the marriage by succession, donation, legacy, or otherwise; and, assuming that there was a change of domicile to the Province of Ontario,

that her rights in that regard were not affected thereby; and also that she has renounced for herself and her children all rights to dower. The question not having been as definitely or as clearly put as it might have been, I am submitting this answer in hopes that I have interpreted the question according to the meaning which the applicant intended to convey.

(2) The answer to question 2 depends upon whether it can be truthfully said that the testator in mentioning in his will "Hector Grenville my adopted son" meant Hector Quinville, sometimes in the family called Hector Tremblay, who was the testator's adopted son. It is in evidence and not contradicted or questioned that the testator had an adopted son named Hector Quinville—the only child whom he did adopt—who was known as Hector Tremblay and was regarded as a member of the family. The testator's son Armand Tremblay, apparently now more than 30 years of age, says that Hector Quinville, known as Hector Tremblay, was a member of the family from his earliest memory; that he looked upon him as his brother, and only in later life learned he was an adopted child. It seems beyond question that when the will refers to Hector Grenville it was the adopted son Hector Quinville who was meant. The strong probability is that the draughtsman, by mistake, made use of the word "Grenville" instead of "Quinville." The answer to this question is therefore, Yes (but to the extent to which there are assets, indicated by the testator, available for that purpose).

(3) The answer to question 3 depends mainly on whether the bequest to the testator's step-sons can be regarded as a class-gift. Precise and very delicate questions arise at times in respect of what constitutes a class-gift. There is no recognised, defined, or exact language, or fixed form of words, necessary to that end. As in many other matters arising out of wills, a conclusion in any given instance must be reached on a consideration of the effect of the language used in the particular circumstances and taken with other relevant parts of the will. At first sight and looking only at the expression "equally between my step-sons and my wife," one may have the impression that it was the testator's intention to create a class-gift, as he has used therein the word "between" and not "amongst." But this impression is modified when it is observed that later in the document he again used the word "between" in a connection which does not point to a class-gift. Then, again, his specific reference by name to each of those whom

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Kelly, J. he calls his step-sons is important. If authorities are to be relied upon—I have read and analysed many of them upon the subject—*Bain v. Lescher* (1840), 11 Sim. 397 (without citing others to the same general effect) may appropriately be cited in support of the opinion which I hold that the bequest under consideration is not a class-gift, but one to the step-sons and the widow equally amongst them, and not one-half to the step-sons and one-half to the widow.

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(4) This question presents some difficulty. The will does not, in so many words, give her one-third of the whole estate, though the plain inference is that the testator believed she was entitled to and would receive it, and, that being so, he was willing that she should have not only that but her share of the “balance” which he directed should go to his step-sons and her. It comes down to this, therefore, that it must now be determined whether she takes that benefit by implication. The doctrine of implication is applied (amongst other instances) to the existence and modification of the interests of persons who are mentioned as objects of the testator’s bounty, so as to give them that which the words of the bequest to them, taken alone, would not create.

In *Parker v. Tootal* (1865), 11 H.L.C. 143, Lord Westbury, at p. 161, defined the doctrine of implication thus:—

“Implication may be founded upon two grounds. It may either arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without, of necessity, involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction.”

If the will shews that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to create, the Court is to supply the defect by implication and thus to mould the language of the testator so as to carry into effect, as far as possible, the intention which it is of opinion the testator has on the whole will sufficiently declared. This was the statement of Lord Kingdown in *Towns v. Wentworth* (1858), 11 Moo. P.C. 526, at p. 543, a case which was followed in *Sweeting v. Prideaux* (1876), 2 Ch. D. 413; *In re Redfern* (1877), 6 Ch. D. 133; and *Mellor v. Daintree* (1886), 33 Ch. D. 198. Some of these decisions were referred to in *May v. Logie* (1896-7), 27 O.R. 501, 23 A.R. 785, 27 Can. S.C.R. 443.

In the *Redfern* case, Bacon, V.-C., said (p. 138) :—

"I do not hesitate in the slightest degree, therefore, to adopt the rule which Vice-Chancellor Hall expressed in *Sweeting v. Prideaux*, that the testator must necessarily have meant what the mere letter of the will does not express."

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I refer also to Hawkins on Wills, 3rd ed., p. 6, where it is said that "the intention of the testator, which can be collected with reasonable certainty from the entire will . . . must have effect given to it beyond, and even against, the literal sense of particular words and expressions."

The principle has been applied also in cases where a clause excluding certain of the next of kin may be capable of being construed as a gift to the persons entitled under the Statutes of Distribution excluding the named persons. See also *Vachell v. Breton* (1706), 5 Bro. P.C. 51; *Bund v. Green* (1879), 12 Ch. D. 819.

An implication similar to that which arises in such cases should be given effect to in a case where the Court can clearly draw the inference from the context of the will that the testator's intention was that the donee should have the benefit to which he believed he (the donee) was entitled as if a next of kin, as well as that which in express language the testator conferred.

I am of opinion, from considering the will as a whole, that the testator's intention was that his wife should have the one-third which she would have received had he died intestate, and also the share of the "balance" which (as above) is to go to her and his step-sons, but excluding any right to dower, she having by the contract renounced this right; and that effect should be given to that intention.

Costs out of the estate, those of the executor as between solicitor and client.

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[ROSE, C.J.]

CLARKSON V. CANADA ACCIDENT AND FIRE ASSURANCE CO.

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*Insurance—Guarantee bonds or policies—Purchase-money obligations—Misrepresentation — Concealment of facts sufficient to cause cancellation of policies—Contracts uberrimæ fidei—Nondisclosure of facts material to risk.*

June 21.

A corporation whose business was to purchase or discount a purchase money obligation taken by dealers in musical instruments was guaranteed against loss by certain guarantee bonds or policies of certain insurance companies.

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*Held* upon the evidence that the writing of these bonds or policies was induced by misrepresentations and as to the later policies by wilful concealment of facts by the insured corporation. The bonds or policies were therefore void.

*Semble* the contracts in question were contracts uberrimæ fidei, and the rule as to disclosure applied to them.

*Seaton v. Heath*, [1899] 1 Q.B. 782, reversed on the facts, [1900] A.C. 135.

*Held* also that if the bonds or policies had not been void *in toto* many claims made thereunder in respect to purchase-money obligations renewed by the insured without the consent of the insurer, would have failed, for failure of the insured corporation to disclose facts material to the risk, even though that non-disclosure might in some cases have been induced by the deception of the dealers from whom the corporation obtained the purchase-money obligations: *London General Omnibus Co. v. Holloway*, [1912] 2 K.B. 72, applied.

IN the above and three other actions brought by the same plaintiffs, all against insurance companies, the plaintiffs sought a declaration that certain bonds of the defendant insurance companies, issued to the plaintiff the Manufacturers' Finance Corporation, are binding upon the defendant insurance companies respectively, a ruling as to the classes of loss in respect of which payment is to be made, and a reference to ascertain the sums for which the defendants respectively are liable upon the footing of such declaration and ruling.

The four actions were tried together, without a jury, by ROSE, C.J., at a Toronto sittings.

*A. C. McMaster*, K.C., *D. L. McCarthy*, K.C., *J. E. Day*, K.C., *J. M. Bullen*, and *R. F. Wilson*, for the plaintiffs.

*W. N. Tilley*, K.C., *F. J. Hughes*, K.C., and *E. Rush*, for the defendants the Canada Accident and Fire Assurance Company and the Sun Insurance Office.

*W. N. Tilley*, K.C., *R. S. Robertson*, K.C., and *J. T. Garrow*, for the defendants the London and Provincial Marine and General Insurance Company.

*W. N. Tilley*, K.C., *Erichsen Brown*, K.C., and *J. T. Strachan*, for the defendants the Southern Assurance Company.

July 21. ROSE, C.J.:—These four actions were tried together. In each the defendant insurance company is sued upon its bond (or, in the case of the Canada Accident and Fire Assurance Company, its bonds) issued to Manufacturers' Finance Corporation Ltd. In each the plaintiffs are Mr. G. T. Clarkson as liquidator and receiver of Manufacturers' Finance Corporation, the Finance Corporation itself, the Trusts and Guarantee Company

Ltd., as trustee for the holders of certain bonds of the Finance Corporation, and three banks (La Banque Canadienne Nationale, the Canadian Bank of Commerce, and the Royal Bank of Canada) with which certain paper, supposed to be guaranteed by the bond of one or another of the defendant insurance companies, had been lodged by the Finance Corporation as collateral security for advances made by the bank to the Finance Corporation. What the plaintiffs seek is a declaration that the bonds are binding upon the defendant insurance companies respectively, a ruling as to the classes of loss in respect of which payment is to be made, and a reference to ascertain the sums for which the defendants respectively are liable upon the footing of such declaration and ruling.

Manufacturers' Finance Corporation was incorporated in or about the year 1923. Its first business seems to have been the financing of dealers in motor-vehicles by the discounting of promissory notes taken by the dealers for instalments of the purchase-price of vehicles sold; but that business seems soon to have been abandoned and the business of financing dealers in musical instruments commenced. It was in connection with this latter class of business that the bonds sued upon were executed.

The first of the policies in question in these actions is the Canada Accident and Fire Assurance Company's bond No. 1629. It was written on the 1st August, 1924, and remained in force until the 12th December, 1926, on which day a notice of cancellation, given 60 days previously pursuant to a term of the policy, became effective; the reason for cancellation being that the Superintendent of Insurance had raised some question as to the insurance company's authority under its licence to write the particular class of policy.

The policy begins with the following recitals:—

"Whereas certain persons, firms and corporations (hereinafter referred to as 'dealers') are acting as selling agents for or dealers in pianos or mechanical player pianos or gramophones (hereinafter referred to as 'musical instruments'), and such dealers sell or lease such musical instruments to the purchaser thereof on time or credit, taking from such purchasers agreements, promissory notes, drafts, acceptances or other documents as evidence of the unpaid balance of the purchase-price of such musical instruments, which agreements, promissory notes, drafts, acceptances or other documents are hereinafter referred to as 'purchase money,' 'obligation' or 'purchase money obligations.'

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“And whereas the corporation from time to time purchases from or discounts for such ‘dealers’ such purchase money obligations:

“And whereas in order to facilitate such purchases or discounts the corporation has requested ‘the Indemnity Company’ to enter into this agreement and it has consented to do so upon the terms and conditions hereinafter set forth.”

It proceeds to witness an agreement on the part of the insurers to ‘indemnify Manufacturers’ Finance Corporation against any loss, except through fire or wrongful conversion, which the corporation may thereafter sustain by reason of purchasing or discounting purchase-money obligations (in an approved form), or by reason of any fraudulent act causing financial loss to the corporation by or through any dealer approved of by the insurers; but the agreement is not to apply unless the purchase-money obligation is given for or in respect of a new or used musical instrument, purchased by a purchaser from a dealer, in respect of which not less than 20 per cent. of the total purchase-price has been paid in cash or credit allowance by the purchaser to the dealer.

The Manufacturers’ Finance Corporation is required in each week in which it purchases or discounts any purchase-money obligation from a dealer to forward to the insurers a written report in respect of each such obligation ‘purchased or discounted in that week, containing the information set forth in a record of entry form (at the trial called a ‘bordereau’) annexed to the policy; and the liability of the insurers in respect of any purchase-money obligation is to commence upon the mailing of the record of entry. The Finance Corporation is to pay to the insurers a fully earned premium (calculated in the manner set forth) in respect of the purchase or discount of any purchase-money obligation covered by the policy. The insurance company is given certain rights to inspect books and to call for information. The Finance Corporation is required to report to the insurers all matured and unpaid instalments of purchase-money obligations purchased or discounted by it, within 90 days after the maturity of such instalments—having meantime made every reasonable effort to collect from the persons liable, except the dealer. The times within which the insurers are to pay losses in respect of the purchase-money obligations are set out; there are provisions for subrogation of the insurers to the rights of the Finance Corporation and for the bringing of actions by the Finance Corporation at the request of the insurers.

There is a provision for cancellation by either party after 6 months by 60 days' notice; provided that such 'cancellation is not to extinguish the liability of the insurers as to any purchase-money obligation purchased or discounted by the Finance Corporation before the effective date of cancellation.

The second policy is the London and Provincial Marine and General Insurance Company's bond No. 0025. It was written on the 20th August, 1925, and was 'cancelled by the insurers by a notice which became effective on the 31st December, 1926, thus being concurrent to a large extent with the Canada Accident and Fire Assurance Company's bond No. 1629. In form it is practically the same as the last mentioned policy. The reason for cancellation seems to have been in part the same and in part the fact that the company was not prepared to write more business of this particular kind than had already been written under the policy.

The third policy is the Northern Assurance Company's 'policy No. M.G. 5282. It was written on the 6th January, 1927, and was cancelled 'by the insurers by a notice which became effective on the 14th February, 1928. Apparently the reason for cancellation was that the risk had become very large and the Northern Assurance Company had decided to drop out for the time being, and perhaps to write a new policy at a later date. This policy differs in form from the earlier policies, the difference apparently being due to an endeavour on the part of the insurers to meet the view of the Superintendent of Insurance. The obligation of the insurers is to indemnify Manufacturers' Finance Corporation against all financial losses which the Corporation may sustain in connection with any purchase-money obligations thereafter purchased from or through any dealers approved by the insurers; provided (a) such financial loss is the result of the deterioration or destruction by fire of a musical instrument owned by the Finance Corporation; (b) such financial loss is the result of the loss or damage by burglary, theft or larceny of a musical instrument owned by the corporation; (c) such financial loss is the result of the maker of such purchase-money obligation failing to carry out his contract. The provision as to notification to the insurers of the purchase-money obligations that are to be covered is somewhat different from the provision contained in the earlier policies. In the earlier policies, as has been noted, the Finance Corporation was required to forward a record of entry in each week in which it purchased or discounted a purchase-money obligation; in the Northern Assurance Com-

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The fourth policy is the Canada Accident and Fire Assurance Company's special policy No. 2091. It was written on the 14th February, 1928, to replace the Northern Assurance Company's policy No. 5282, and was cancelled by the insurers by a notice given on the 18th July, 1928 (after the insurers had been advised that Mr. F. G. Clarkson had taken charge of the Finance Corporation as temporary manager), which became effective on the 16th September, 1928. This policy is to all intents and purposes the same as that of the Northern Assurance Company.

The fifth and last policy is bond No. 80424 of the Sun Insurance Office. It was written on the 3rd May, 1928, in the same form as the policy of the Northern Assurance Company. On the 18th June, 1928, the Sun Insurance Office wrote to the Finance Corporation taking the position that the policy had not become binding.

The proposal for the first of the policies, the Canada Accident and Fire Assurance Company's bond No. 1629, was made through Mr. Proctor, the assurance company's agent at Toronto. The operations of Manufacturers' Finance Corporation were controlled by W. M. McDonald, the secretary-treasurer. Mr. Proctor had interviews with him in which the class of protection required by the Finance Corporation was indicated, and the manner in which the Finance Corporation conducted its business was discussed. In the discussion particular attention was paid to the manner in which collections of the instalments of the purchase-price of musical instruments was made, this being a matter of outstanding importance to the insurers. McDonald said that he had a very good collecting organisation, which organisation, as Mr. Proctor understood, looked after the collections, which were not in any case left to be made by the dealers from whom the Finance Corporation had acquired the purchase-money obligations. McDonald said, as Mr. Proctor reports it, that the collections "were 95 or 98 per cent. good," and the impression conveyed was that the remaining 5 per cent. or 3 per cent. might be slow. It seems to have been stated specifically that there had been no losses. These statements were by Mr. Proctor repeated to Mr. Roden, the manager of the assurance company, who himself had interviews with McDonald, in the course of which McDonald made statements similar to those that had been made to Mr. Proctor. There

was no intimation either to Proctor or to Roden that the collections, or any of them, were made otherwise than by the Finance Corporation itself.

The business was introduced to the London and Provincial Marine and General Insurance Company by C. J. Jennings, an insurance broker, carrying on business at Hamilton. Mr. Jennings, having learned that the Finance Corporation required more insurance, called upon McDonald and communicated with Mr. Gray, the insurance company's manager at Montreal, and on an occasion when Mr. Gray was in Toronto went with him to see McDonald. Again the Finance Corporation's methods of conducting its business were discussed, and, while McDonald may not have stated the fact definitely, the impression gained was that the collections were being made by the Finance Corporation. There was no disclosure of the fact that there had been any default by purchasers in the payment of instalments.

It was Mr. Jennings also who introduced the business to the Northern Insurance Company. It was suggested to him by Mr. Gray that, the Canada Accident and Fire Assurance Company and the London and Provincial Company being off or about to go off the risk, the risk might be offered to the Northern Company. Mr. Jennings thereupon opened communication with Mr. Hurry, the Canadian manager of the Northern Company. Having first procured from the London and Provincial Company a letter certifying that no losses under their policy had been reported, he told Mr. Hurry—and no doubt as a consequence of his conversations with McDonald he believed it—that the Finance Corporation's collecting system was so successful that the corporation had had no losses, and that the Superintendent of Insurance, at an interview when the right of the companies to do the class of business was under discussion, had insisted that the collections were to be made by the Finance Corporation itself. Mr. Hurry asked what would happen if a purchaser failed to pay instalments as they fall due, and Mr. Jennings assured him that in such a case the insurers would be advised, and the procedure outlined in the policy would be followed. Mr. Hurry communicated with Mr. Gray and asked him specifically why the London and Provincial Company was about to go off the risk. Mr. Gray explained that the amount of business written under the London and Provincial Company's policy exceeded the amount which the company desired to have at stake. Mr. Hurry, being satisfied with the truth of the represent-

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When the Northern Company went off the risk and it was necessary to place the insurance elsewhere, Mr. Jennings approached Mr. Roden of the Canada Accident and Fire Assurance Company. Mr. Roden, of course, thought that he knew something about the Finance Corporation's operations, as his company had been on the risk under bond No. 1629, and perhaps he asked fewer questions than did some of the other managers. During the currency of bond No. 1629, he had been told by McDonald something about the Finance Corporation's supposed system of collection, and McDonald had made it very clear that the Finance Corporation was itself making the collections; and Mr. Jennings informed Mr. Roden that there had been no losses under the policy of the London and Provincial Company or of the Northern Company, which information was confirmed when Mr. Roden communicated with officers of those companies. About the time of the writing of the new policy No. 2091—it may have been just before or just after the policy was written—McDonald told Mr. Roden that the collections had been coming in well and that no insurer had been called upon.

The Sun Insurance Office's policy No. 80424 was also procured through the instrumentality of Jennings. To Mr. Root, the manager for Canada, and Mr. Dewar, the head of the Casualty Department of the Sun Insurance Office, Jennings stated that the Manufacturers' Finance Corporation required further insurance; that the business had been very satisfactory to the other insurance companies; that there had been no losses; that the Finance Corporation had a wonderful collection organisation; and that it was in part because of the excellence of that organisation that there had been no losses. Mr. Root visited Mr. Hurry, who confirmed, as far as the matters were within his knowledge, the statements made by Mr. Jennings.

Before discussing the accuracy or inaccuracy of the representations made to the several insurance companies, and the effect upon the liability of the companies of such inaccuracies as there were, it is desirable to state something both as to the relationship between Manufacturers' Finance Corporation and the several dealers in musical instruments, and as to the manner, especially as regards financing, in which the Finance Corporation's business was conducted.

Some of the purchase-money obligations purchased or discounted by the Finance Corporation were no doubt acquired from dealers who were independent of the Finance Corporation. But to a large extent the dealers were dealing in instruments in which the Finance Corporation had an interest before the instruments came to the hands of the dealers. Manufacturers' Finance Corporation does not seem directly to have owned the shares of or otherwise to have controlled manufacturing companies; but some of the directors or officers of the Finance Corporation were interested in a company that manufactured pianos and in another company that manufactured gramophones. To these companies the Finance Corporation made advances which were secured by a pledge of some sort of the instruments manufactured or in course of manufacture; so that when the instruments reached the hands of the dealers the Finance Corporation was already interested in them. In the case of such instruments, the Finance Corporation when discounting a purchase-money obligation for (or acquiring it from) a dealer would first of all repay to itself the advance made by itself to the manufacturer; and the dealer would get credit on the books of the Finance Corporation for the discounted value of the purchase-money obligation less the amount of this advance. This fact perhaps does not bear very directly upon the issue as to the liability of the insurance companies under their policies, but it seems to be something that ought to be mentioned as part of any statement as to the Finance Corporation's system of financing. It may also be noted that many of the dealers were assisted to some extent by direct advances made by the Finance Corporation, otherwise than by way of discount of purchase-money obligations.

The business done by the Finance Corporation was very large. Some 18,500 purchase-money obligations, representing approximately \$4,540,000, were handled between the spring of 1923 and the time when Mr. Clarkson took charge in July, 1928; and of these some 11,800, representing some \$2,780,000, were entered on one or another of the bordereaux. The corporation, therefore, had to have a large amount of working capital. Some of this was obtained by the issue of shares for cash; but a very large part was obtained by borrowing. The borrowing took two forms—the one, the procuring of advances from one or another of the plaintiff banks and the lodging of purchase-money obligations as collateral security, the other, a borrowing on short-term bonds secured by a deposit of purchase-money obligations with the Trusts

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and Guarantee Corporation as trustee for the bondholders. From first to last more than two million dollars was raised by the issue of bonds—of which a large part is outstanding.

The policies sued upon in this action are not the earliest policies of the same class issued to Manufacturers' Finance Corporation. The Alliance Assurance Company wrote two policies, the one in September, and the other in November, 1923, each in a form which served, apparently, as a draft for the Canada Accident and Fire Assurance Company's first policy, the first of them covering loss arising from the purchase or discount of notes given for instalments of the purchase-price of motor-cars, and the second covering loss arising from the purchase or discount of notes given for instalments of the price of musical instruments. Each of these policies was assigned to La Banque d'Hochelaga (now known as La Banque Canadienne Nationale) as collateral security on the 12th November, 1924. From time to time during the currency of the several policies here in question documents of assignment, or documents making the loss payable to a bank or to the Trusts and Guarantee Corporation, were issued by the Finance Corporation. Indeed, in the agreement between the Finance Corporation and the Trusts and Guarantee Corporation, executed in 1925, before the first of the bond issues, it was stipulated that the securities (that is the purchase-money obligations) lodged with the trustee should be insured against loss by a company satisfactory to the trustee, and that the policies should be assigned to, and that certified copies should be deposited with, the trustee, with loss thereunder payable to the trustee as its interest should appear. The carrying of insurance was thus an essential feature of the system of financing the Finance Corporation's operations.

Notification of the several assignments and of the documents making the loss, if any, payable to a lender, was given to the insurance companies, and acknowledgment of receipt of the several notifications was secured; but at this point it may be noted that no contractual relationship between any insurance company and a bank or the Trusts and Guarantee Company seems to have been created, that nothing was done which estops any insurance company from setting up as against the Trusts and Guarantee Company or a bank any defence which is open as against the Finance Corporation, and that the question of the liability of the insurance companies upon their policies falls to be dealt with as it would have

been if Manufacturers' Finance Corporation has been the sole plaintiff in the action.

The fact that no claims were by the Finance Corporation made upon any insurance company has been noted, as well as some of the statements made to the insurers. The statement that there had been no defaults was untrue at the time when the first of the policies (the Canada Accident and Fire Assurance Company's bond No. 1629) was written. And as time went on it became increasingly untrue. On the 1st August, 1924 (the date of bond No. 1629), Manufacturers' Finance Corporation had on hand 1,264 accounts, of which 864 were delinquent; and 218 of the 864 had been delinquent for 90 days or more; and later on hundreds of accounts became delinquent and were dealt with in a manner that will be stated.

The Manufacturers' Finance Corporation adopted a strange practice with reference to the purchase-money obligations of purchasers who were unwilling or unable to meet the instalments as they fell due. When a purchaser's account had been for some time delinquent, there was made in the books of the Finance Corporation an entry charging the account back to the dealer from whom the purchase-money obligation had been acquired. The dealer then would make a pretended resale of the musical instrument to the purchaser, and would take a new purchase-money obligation dated concurrently with the pretended resale. This new purchase-money obligation would then be discounted by the Finance Corporation, and the dealer would be credited in the Finance Corporation's books. Then the new purchase-money obligation (which the witnesses generally speak of as a renewal note) would be listed on one of the insurance bordereaux, and would be pledged to the Trusts and Guarantee Company or to one of the banks. And all this would be done without any consideration of the question as to who might be the owner of the musical instrument—whether the purchaser, the dealer, the Finance Corporation or a pledgee from the Finance Corporation of the original purchase-money obligation—and, of course, without any notice either to the holder of the original purchase-money obligation or to any insurance company. And there are many instances of one or more repetitions of this transaction; so that frequently it happened that there would be pledged and insured an original and two or even more renewal purchase-money obligations. It is not suggested that in every case in which payments of instal-

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ments fell into arrears this practice was followed, but it was followed in a very large number of cases, so that a substantial proportion of all the purchase-money obligations listed on the bordereaux of one or another of the insurance companies represented renewals of purchase-money obligations listed with the same or another insurance company. Sometimes the misconduct was even more glaring. An instance was given at the trial of a purchase-money obligation and two renewals which were dealt with as follows: The first renewal was hypothecated to the Trusts and Guarantee Corporation in November, 1926, and entered upon a bordereau of the London and Provincial Marine and General Insurance Company. Then in May, 1927, the original was hypothecated to the Canadian Bank of Commerce, and listed on a bordereau of the Northern Insurance Company; and finally, in February, 1928, the second renewal was hypothecated to the Trusts and Guarantee Company and listed on a bordereau of the Northern Insurance Company.

How many cases there may have been of the kind just described it is impossible to say, but the practice was very general; perhaps some indication of its extent is to be found in the fact that of 3529 purchase-money obligations listed with the London and Provincial Marine and General Insurance Company, 545 were renewals, and that of \$2,780,000, which was the total insured value of the notes listed on bordereaux (of all the companies), \$589,000 represented renewals; and in the further fact that of the notes listed with the London and Provincial Company 1,289 were subsequently renewed, nothing being done to take them off the London and Provincial Company's list.

It was not only by listing renewal notes as original purchase-money obligations that Manufacturers' Finance Corporation acted towards the insurance companies in a manner not contemplated by the policies. For instance, what was in contemplation by the insurance companies (as is evidenced by one of the recitals in the earlier policies) was that the Finance Corporation should acquire purchase-money obligations by discounting them for or purchasing them from dealers in musical instruments, and that the risk run by the Finance Corporation in so discounting or purchasing the obligations should be the risk insured against. But the Finance Corporation took some purchase-money obligations as collateral security to advances made to dealers and entered some of such obligations upon the bordereaux. There were not many cases in

which this was done; but it was done sometimes. Then it was in contemplation (and in the earlier policies it was stipulated) that the purchase-money obligations should be listed with the insurer promptly on their acquisition by the Finance Corporation; but in very many cases there was no listing until the purchase-money obligation had been for some time in the hands of the Finance Corporation, and sometimes there was no listing until default had occurred. When the purchase-money obligation was listed for insurance after default had occurred, it was as a rule listed only to the amount of the instalments unmatured at the time of the listing; but there are cases in which it was listed for an amount which included the overdue instalments.

Of course the irregularities in these listings were not brought to the attention of the insurers, who would assume, naturally, that the obligation listed was one recently acquired by the Finance Corporation, and that it was not in default. If an obligation was in default and was listed only for the unmatured instalments, the indication to the insurer would be that the down payment made by the purchaser had been greater than in reality it was, and, of course, the ratio between the down payment and the sum that was to be paid by instalments would seem to be favourable.

Now if each listing of purchase-money obligation upon a bordereau were to be treated as the obtaining of a contract of insurance or of guarantee in respect of that particular note, it would have to be held that as regards many of the purchase-money obligations so listed the contract was unenforceable. For instance, there could be no enforcement of the contract in respect of a purchase-money obligation afterwards renewed without the consent of the insurance company; and this for two reasons, the first, the failure of Manufacturers' Finance Corporation to give notice of the default within 90 days as required by the policy, and the second the unauthorised giving of time to the principal debtor. Again, if a purchase-money obligation was not listed until after default in the payment of instalments, non-disclosure of the defaults would be a good defence to the insurance company, the case falling clearly within the principle of the decision of the Court of Appeal in *London General Omnibus Co. Ltd. v. Holloway*, [1912] 2 K.B. 72; and in the case, at least, of the earlier policies the delay in listing would be another defence; and these defences would be available even if (as sometimes happened) the default had been made good before the time of

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the listing. And in the case of the listing of a renewal note there would be more than one good defence. The non-disclosure of the fact that there had been default in paying the instalments provided for by the original purchase-money obligation would be one, and the fact that the renewal note was not really a note taken by a dealer upon the sale of a musical instrument would be another; and these defences would be available even in the cases, of which there are said to be examples, in which the dealer had deceived the Finance Corporation by omitting to indicate, on the discount sheet sent by him to the Finance Corporation, that the document was in reality a renewal. Also in the cases of purchase-money obligations properly listed on bordereaux and coming into default for more than 90 days, no notice being given to the insurance company within the 90 days, the Finance Corporation's failure to perform its obligation to give notice would be, I think, an answer to any claim made, within the time limited, in respect of subsequent defaults. There are cases of this sort in which Mr. Clarkson has given notice of the later defaults.

If all of the cases just mentioned, and others which perhaps have been overlooked, in which there could be no recovery were eliminated, the total of the claims asserted by the plaintiffs in these actions would be very materially reduced—to what extent one cannot say, but very materially. However, it is my opinion that the Finance Corporation's misconduct has had a result much more serious than the mere avoidance of the liability of the insurance companies in cases falling within particular classes.

In the course of their arguments counsel gave considerable attention to the question whether, in so far as the defence to the actions is based upon non-disclosure, the governing rules are those that are to be found in the cases relating to guarantees or the stricter rules that have been applied in insurance cases. Throughout this judgment the terms "insurance" and "policy" have been used; but that has been for the sake of convenience and without any intention of deciding the question mentioned; for in my opinion the question is unimportant. I take it that in the reported cases of guarantees in which it has been held that the party guaranteed owed no duty to the guarantor as to the disclosure of material facts, the contracts had in substance the characteristics referred to by Romer, L. J. in *Seaton v. Heath*, [1899] 1 Q.B. 782, at p. 793, one of which is that "the risk undertaken is generally known to the surety, and the circumstances generally point to the

view that as between the creditor and surety it was contemplated and intended that the surety should take upon himself to ascertain exactly that risk he was taking upon himself." In the reversal by the House of Lords upon the facts—[1900] A.C. 135—of the judgment of the Court of Appeal in *Seaton v. Heath* there is nothing to cast doubt upon the correctness of Lord Justice Romer's statement of the circumstances in which a contract of guarantee may be a contract *uberrimæ fidei*. In the present cases the facts were within the knowledge of the Finance Corporation and could not have been ascertained by the insurance companies without prolonged investigation, if at all; and the circumstances all seem to point to the view that there was never any intention that the insurance companies should ascertain for themselves the nature of the risk that they were undertaking. My opinion, therefore, is that in the making of the contracts *uberrima fides* on the part of the Finance Corporation was requisite. But, as will appear, I do not think that the case turns upon this question.

What seem to be the outstanding facts of the case have been stated. But many days were spent in the taking of evidence; very many exhibits were introduced; and numerous transactions of one sort or another, supposed to be typical, were investigated quite thoroughly; so that there is a mass of material which cannot readily be condensed; and any inference that is to be drawn must be based, not upon such facts only as can be set forth in a summary, necessarily incomplete, but upon a consideration of the case viewed as a whole, and as a jury would regard it. Upon such a consideration of all the facts, I have reached the conclusion that the writing of each of the policies was induced by fraudulent misrepresentation—some of it in the form of statements made by McDonald directly to the responsible officer of the insurance company, and some if it reaching the insurance company through an agent's or broker's repetition of statements which McDonald had made to him in the expectation that they would be repeated; and that from the time when the first of the defendant companies, the Canada Accident and Fire Assurance Company, assumed the risk in August, 1924, until the control of the Finance Corporation's affairs passed into the hands of Mr. Clarkson in August, 1928, there was a fraudulent concealment by the Finance Corporation of facts the disclosure of which would have been followed at once by the cancellation of any policies in force at the moment of the disclosure and would have rendered the placing of further insurance an impossibility.

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There is not a great deal of evidence as to the manner in which Manufacturers' Finance Corporation had been conducting its business between the time of its incorporation and the time of the writing of the first of the Canada Accident and Fire Assurance Company's policies. The fact that it had been doing some business in purchase-money obligations given by purchasers of motor-cars and of musical instruments and that default had been made by some of those purchasers has been noted, as has also the fact that there had been some borrowing from La Banque d'Hochelaga (La Banque Canadienne Nationale), that purchase-money obligations had been lodged with the bank, and that formal assignments of the Alliance Assurance Company's policies were given to the bank in November, 1924. This, apparently, was pursuant to an earlier arrangement. But I do not think that there is proof that before the Canada Accident and Fire Assurance Company's first policy was written there had been any pledging of renewal notes while the originals were outstanding. The proof, then, of false statements or concealments inducing the insurer to assume the risk is more limited in the case of this first policy than in the case of the others. The false statements proved—the statements, for instance, that the Finance Corporation had an excellent collecting organisation (the fact being that it had no collecting organisation that was worthy of the name; and that it was leaving the dealers to get in the instalments); that there had been no "losses," whereas many notes were in default; and so on—were, in my opinion, amply sufficient to avoid the policy; but the fact remains that in respect of misrepresentations and concealment antedating the writing of the policy—as distinguished from later concealment designed to ward off cancellation—the case as regards this first policy is not as strong as the cases of the later insurers. The later insurers were told everything that had been told to the Canada Accident and Fire Assurance Company; and in addition they were told that no losses had been reported to their predecessors upon the risk (which was a statement literally true but most misleading); and the fact that there had been a constant entry of renewal purchase-money obligations upon the bordereaux, and a pledging of the renewals while the original purchase-money obligations were extant, and that the Finance Corporation had been conducting its business in the manner that has been stated, was concealed from them. That the concealment was wilful is, I think, the only possible inference from the facts proved. One significant fact that

has been referred to incidentally is that, although large sums of money were being paid in premiums, and although vast numbers of instalments payable under purchase-money obligations discounted became overdue and so continued for more than 90 days, no default was from first to last reported to an insurance company. The number of defaults that might have been, and according to the terms of the policies ought to have been, reported cannot be stated: no attempt has been made to count the claims sent in by Mr. Clarkson; but some indication of the number is to be found in the estimate of a witness (James Young) that at one time or another while the Northern Insurance Company's policy was in force not fewer than 4,000 instalments were overdue for 90 days or more. The reason why no defaults were reported is, I think, obvious. Any claim presented to an insurance company would have been investigated; disclosure of the Finance Corporation's manner of financing would have followed; the policy would have been cancelled; the Trusts and Guarantee Company would have refused to certify further bonds; the banks would have called in their advances; and the collapse which came in 1928 would have come at once. The Finance Corporation simply could not assume the risk of making a claim. A letter of McDonald's to La Banque Canadienne Nationale dated the 14th March, 1925, is not without significance. The bank had asked for an assurance that the Finance Corporation was complying with the conditions of the policies. McDonald asked them not to be "to strict" about the policy—not to "make it too difficult for" the Finance Corporation in that regard.

If I am correct in thinking that the policies were procured by fraudulent misrepresentations, and, at least in the case of the later policies, fraudulent concealment, the actions, of course, must fail. And, even if I am wrong in thinking that fraud has been established, they must fail if any duty as to disclosure rested upon Manufacturers' Finance Corporation—even if that duty was no more than a duty to disclose such of the material facts as were not likely to be within the knowledge of the insurers; for there cannot be any doubt that (subject to what has been said concerning the earliest policy) facts that were most material, that were within the knowledge of the Finance Corporation alone, and that could not have been imagined to be known to the insurance companies, were not disclosed.

The actions will be dismissed with costs.

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## [IN CHAMBERS.]

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D. v. D.

July 28.

*Appeal—Leave — Commission evidence in divorce action — Doubt — Importance.*

The question as to when a commission to take evidence in a divorce action should issue and what witnesses should be allowed to be so examined is a matter of such doubt and importance, that leave to appeal from an order of a Judge in Chambers, sitting in appeal from a master, should be granted.

APPEAL by the plaintiff from an order of the Master dated the 15th May, 1931, dismissing the plaintiff's motion for the issue of a commission to take the evidence of Hazel, the co-defendant or co-respondent in a husband's action for divorce, and of two other persons, in Miami, Florida.

The appeal was heard by SEDGEWICK, J., in Chambers.

*Wilfrid Heighington*, for the plaintiff.

*G. A. Grover*, K.C., for the defendant Dorothy D.

July 14. SEDGEWICK, J.:—The order is a discretionary order. The Master exercised that discretion and I should not readily interfere with the exercise of that discretion.

I am quite in agreement with the Master that the evidence of the defendant Hazel, the co-respondent, should be heard by the Judge trying the action. The exhibit to the plaintiff's affidavit, which is an affidavit by Mrs. Kilgour, another of the persons, moved the Master to decide that a commission should not issue to take her evidence, but that she should be cross-examined in Court at the trial.

The other proposed witness, Dr. Withers, does not appear to be of any importance on the main issue.

Being in strong agreement with the Master with reference to defendant Hazel, and not disagreeing with his opinion as to the other witnesses, I think the appeal should be dismissed with costs to the defendant Dorothy Dymond in the cause.

The plaintiff moved for leave to appeal from this order of SEDGEWICK, J.

July 24. The motion was heard by ORDE, J.A., in Chambers.

*A. C. Heighington*, K.C., for the plaintiff.

*Grover*, K.C., for the defendant Dorothy D.

July 28. ORDE, J.A.:—The plaintiff moves for leave to appeal from the order of Mr. Justice Sedgewick, made on the 14th July,

1931, dismissing an appeal from the refusal of the Master (Mr. Drew) to order the issue of a commission to examine certain witnesses abroad.

The action is brought by a husband for divorce. The plaintiff desires to call the co-defendant, with whom he alleges his wife committed adultery, as well as two other persons, as witnesses at the trial, but the co-defendant and the other witnesses are in Florida, U.S.A., and cannot be compelled to appear, and it is sworn that the cost of bringing them to Ontario would be prohibitive (whatever that may mean). The adultery charged is alleged to have taken place in Florida, where the co-defendant lives. No other acts were charged. The defendant wife denies the charge and intends to defend the action at the trial.

The learned Master dismissed the application because he did not think the material before him shewed that it was impossible to get the witnesses to Toronto for the trial, and that the expense, while "prohibitive" for one plaintiff, might not be so for another. He further thought that it was desirable that the evidence of the co-respondent should be heard by the trial Judge, and that as to the other two witnesses the plaintiff had failed to shew in one case that the evidence was material, and in the other that the witness could not appear.

My Brother Sedgewick in a written judgment has agreed with the Master.

The plaintiff now seeks leave to appeal. Under Rule 493, before granting leave, I must be satisfied that there appears to be good reason to doubt the correctness of the decision in question and that the appeal involves matters of such importance that in my opinion leave should be given.

Mr. Heighington strenuously argued that, while the issue of a commission was in a sense a matter of judicial discretion, yet in a proper case a party is entitled to it as of right. I cannot wholly agree with this view, but it is clear from the authorities that, while the issue of a commission is discretionary, the discretion is governed by certain principles, and I have some doubt as to whether the grounds relied upon by the Master and my brother Sedgewick are sound.

Mr. Grover argues that, as the plaintiff's case depends wholly upon the alleged intercourse between the defendant and the co-defendant, it would not be proper that the whole evidence upon which the plaintiff relies should be taken by commission and without any opportunity for cross-examination before or by the trial

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Orde, J.A. Judge. There is much force in this, and, divorces involving the  
 1931. status of the parties and being a matter in which the public is  
 D. v. D. concerned, it seems hardly proper that the question should be  
 determined upon evidence taken abroad. If this view prevails,  
 then it may be that a person seeking a divorce who cannot get  
 his or her witnesses before the Court may have to accept the situ-  
 ation though it may involve a denial of justice. Any decision to  
 this effect might have far-reaching consequences when it is re-  
 membered that witnesses in other Provinces of Canada (except  
 Quebec) cannot be compelled to testify in civil actions before a  
 provincial court against their will.

I was not furnished with any authority as to how questions  
 of this sort are dealt with in England; but, so far as I can gather,  
 the practice in England as to granting commissions in divorce  
 actions does not differ from that in ordinary cases.

There seems, therefore, to be good reason for doubting the  
 correctness of the decision in question, and I am of the opinion  
 that the matter is of sufficient importance to warrant the adjudica-  
 tion of the highest Court in the Province.

Since the argument I have discussed the matter with my  
 brother Sedgewick. He concurs in my view as to the importance  
 of the question and that it ought to go to a higher court.

Leave to appeal will therefore be granted. The costs of this  
 application will be in the cause.

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[APPELLATE DIVISION.]

1931.

REX V. BROCKENSHIRE AND CLARKSON.

Aug. 11.

*Murder—Defence of insanity—Exclusion of evidence—No prejudice—  
 No new facts—Issue—Verdict.*

At the trial of the prisoner certain evidence as to insanity was ex-  
 cluded. The nature of this evidence was shown to the Court of  
 Appeal by affidavits, and disclosed that had the said evidence been  
 admitted at the trial no new facts would have been placed before  
 the jury.

*Held* that the prisoner was not prejudiced by the exclusion of the  
 evidence and consequently no substantial wrong or miscarriage of  
 justice occurred and the appeal accordingly must be dismissed.

The evidence in question tended to show that the prisoner was suffer-  
 ing from a mental disease. But the issue was whether he had that  
 disease to such an extent as to render him incapable of appreciating  
 the nature and quality of his act or of knowing that such act was  
 wrong. The verdict of the jury was quite consistent with a finding  
 that he had the disease but not to the requisite extent.

APPEAL by the prisoner Brockenshire from his conviction upon trial before WRIGHT, J., and a jury, of the murder of one Roy McQuillan, a police officer, on the 11th December, 1930.

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July 2 and 3, 1931. The appeal was heard by MULOCK, C.J.O., MAGEE, MASTEN, ORDE, and FISHER, JJ.A.

*W. K. Murphy*, K.C., and *E. L. Claridge*, for the appellant. The learned trial Judge erred in his charge to the jury in dealing with the defence of insanity, when he failed to point out that the accused was entitled to be found not guilty on the ground of insanity if he proved that he did not know the nature and quality or his act or that it was wrong. The learned trial Judge failed to instruct the jury correctly as to what amounts to insanity as a defence in law under sec. 19 of the Canadian Criminal Code as interpreted in *Rex v. Cracknell*, ante. The trial Judge erred in confining the evidence of the defence to the abnormal actions of the appellant between the hours of 4.30 and 7.30 p.m. on the day he was admitted to the hospital. He also erred in admitting as evidence a statement made by the appellant to police officers, while a patient in the hospital suffering from gunshot wounds. This was not a free and voluntary statement as required by law. It should not have been referred to by the learned trial Judge as evidence of the sanity of the prisoner.

*C. W. Bell*, K.C., and *W. B. Common*, for the Crown. There is nothing in the evidence to indicate any miscarriage of justice. The chain of events on the days preceding the shooting shew an intelligent power of planning and scheming on the part of the appellant. The shooting was not done in a moment of excitement or inflamed anger but was a calmly deliberate act. If the exclusion of evidence complained of were of any real consequence the appellant has not shewn any substantial miscarriage of justice.

August 11. The judgment of the Court was read by MULOCK, C.J.O.:—This is an appeal by John Brockenshire from his conviction of murder of one Roy McQuillan. The following are the circumstances which led to the act in question:—

On the evening of the 11th December, 1930, McQuillan, a member of the Toronto police force, in company with Constable Haliburton, went in an automobile in search of a stolen motor car, which they discovered proceeding along Scarlett-road, in the city of Toronto, being driven by the prisoner Brockenshire,

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Clarkson occupying the rear seat. Both cars came to a stop, and McQuillan, going to the front of the stolen car, opened its front door, and, when the prisoner asked him "What was the idea?" McQuillan asked him where he got the car. The prisoner said, "This is my car," whereupon Haliburton said to the prisoner, "This car is reported stolen." McQuillan asked the prisoner for his driver's licence, and the prisoner said "I have it," and seemed to reach in his pocket as if to produce it, and then said to Clarkson, "You have it, have you not?" and he continued to act as if endeavouring to get the permit. Then McQuillan said, "Now, I had better take them in," whereupon the prisoner, calling McQuillan a vile name, said "Stick them up," and fired several revolver shots at McQuillan and killed him. During the firing Haliburton jumped to the rear of the car and fired at the prisoner, wounding him. The prisoner and Clarkson then escaped, but the next day were arrested. The prisoner had been seriously wounded in the abdomen, and at 4.30 p.m. of the 12th December was taken to St. Joseph's Hospital, and at 7 p.m. was operated upon for his wounds, and remained in the hospital until the 25th February, when he was removed to the Toronto gaol, and on the 6th May he and Clarkson were put on trial together for the murder of McQuillan, and the prisoner was found guilty and Clarkson not guilty. From his conviction the prisoner appeals.

At the commencement of the trial, counsel for the prisoner stated that the defence would be insanity, whereupon the learned trial Judge inquired if the prisoner was fit to plead and his counsel said he was. Thus the real question to be determined was whether the prisoner at the time of killing McQuillan was suffering from any species of insanity which the law recognises as constituting a defence.

The defence is that when the prisoner killed McQuillan he was labouring under a disease of the mind called *dementia præcox* of the hebephrenic type, which rendered him incapable of appreciating the nature and quality of his act or of knowing that it was wrong. The act of killing was proved, and the evidence of three medical alienist experts and of other witnesses was given in support of the defence. The trial Judge, Mr. Justice Wright—a most careful Judge—conducted the trial with the utmost fairness to the prisoner, and in his charge to the jury fairly reviewed the material evidence and correctly stated the law applicable to the issue. On the retirement of the jury to consider their verdict, the

prisoner's counsel took objection to the construction which he contended the learned trial Judge had placed upon subsec. 1 of sec. 19 of the Criminal Code, whereupon the jury was recalled and the learned Judge addressed them as follows:—

“With reference to the plea of insanity I read to you the Criminal Code stating that, if it appears that the man did not appreciate the nature and quality of the act and that it was wrong, he would be insane within the law; that is in either case: if he knew the nature and quality but did not know that it was wrong he would be insane within the law. I think I stated that to you, and I now repeat to you that that is the law. To be sane within the law he must have an appreciation both of the nature and quality and that it was wrong. That is what I said to you.” This was a correct statement of the law, and if any previous observations of the learned Judge as to the meaning of the subsection in question are open to any other construction they were superseded by what he thus told the jury.

The onus was upon the Crown to prove to the satisfaction of the jury that because of mental disease he was not criminally responsible for his act in killing McQuillan, and the jury by their verdict have said that he failed to discharge such onus. Therefore the verdict cannot be disturbed unless in the conduct of the case there has been some erroneous ruling or misdirection which has occasioned a miscarriage of justice.

The prisoner complains of the refusal of the learned trial Judge to admit certain evidence of Margaret Kelly, Marion Shannon, and Dr. McLarty. Margaret Kelly and Marion Shannon were nurses in St. Joseph's Hospital when the prisoner was admitted on the 12th December and until his removal to gaol on the 25th February. They each were in attendance upon him on the 12th December from 4.30 p.m. until 7 p.m., when he was removed to the operating room; and for seven weeks Margaret Kelly and for three weeks Marion Shannon before the 25th February were in charge of the ward where he was and had daily opportunity of observing him. They gave evidence as to the conduct of the prisoner up to 7 p.m. of the 12th December, and the learned trial Judge held that their evidence as to his subsequent conduct (which included statements) was inadmissible.

In *Rex v. Townley* (1863), 3 F. & F. 839, the charge was murder and the defence insanity. On behalf of the prisoner evidence was given of statements made by him subsequent to the act, and in

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his charge to the jury the trial Judge, Martin, B., told them that they must judge of the act by the prisoner's statements and what he did at the time.

In *Rex v. Carson*, The London Times of the 25th November, 1905, p. 57, the accused was charged with murdering a child and the defence was insanity. A few days after the murder, the prisoner made a statement to one of the medical witnesses who was attending her and it was admitted on her behalf, and because of her insanity she was held not responsible.

Commencing at p. 64 of Russell on Crimes and Misdemeanours, 8th ed., are set forth many criminal cases where, the defence being insanity, the conduct of the accused, including his statements, subsequent to the act, was admitted in evidence against him.

Here, the guilt or innocence of the prisoner depends upon his state of mind when he killed McQuillan.

The foundation having been laid by evidence of prior and contemporaneous conduct from which the jury might or might not have inferred that the prisoner was insane within the legal definition of the term, in the unanimous opinion of this Court the evidence of subsequent conduct was relevant and admissible as to the proper inference to be drawn from such anterior and contemporaneous conduct; but it was for the jury to determine the weight to be given to such evidence.

Miss Kelly and Miss Shannon have set forth in their affidavits the nature of the evidence which they were prevented from giving. Miss Kelly at the trial swore that when the prisoner was brought into the hospital, and until he was removed to the operating room, he was immune from pain, was staring at the ceiling all the time and was indifferent to his surroundings and to the people who were present. In her affidavit she says that for seven weeks until the 25th February the prisoner exhibited marked indifference to pain, though he must have been suffering great pain; that he was totally indifferent to any and all things in his room, that he would turn his head towards her when she entered the room and would not recognise her; that on many occasions, without reason, his countenance would break out into a sort of sickly smile which had no expression, and that he was always continually staring apparently into space.

Miss Shannon's evidence before the prisoner was removed to the operating room did not materially differ from that of Miss

Kelly, and the evidence which she says in her affidavit she was prepared to give as to the prisoner's conduct during the three weeks before the 25th of February was substantially the same as Miss Shannon's.

Dr. McDonogh also gave evidence of the mental condition of the prisoner from the time of his admission to the hospital until his removal to the gaol. He was physician-in-chief to the hospital and specialised in mental cases and he observed the conduct of the prisoner when in the hospital both before the operation on the 12th December and until his removal to the gaol on the 25th February. His observations from a mental point of view were as follows: Before the operation the prisoner was indifferent, seemed to be much more immune to pain than the ordinary case of serious wounds, gave a silly smile, was indifferent to his surroundings, would frequently stare from one side of the room to another. Saw him each day between the 12th and 17th December and observed his marked indifference to his surroundings, to the other patients; his immunity—apparent immunity—to pain; observed him almost daily until the 10th February. During that period he observed his marked indifference to those around him, he never spoke to the patients, seldom spoke to the police officers, marked immunity to pain, noticed him smile in a silly manner, probably five times, and had a definite, vacant stare many times, and on the 10th February made a complete neurological and mental examination. Observed him from the 10th February to the 18th February, when he made another examination. During those dates he observed marked indifference and immunity to pain. The same symptoms were more marked, the silly smile was oftener as he improved; the staring had become quite marked. When asked a question he would answer "I don't know," and he would not answer at other times, would answer quickly and break off from the conversation; lacked continuity of thought. He made the same observations from the 18th February until the 22nd February. Dr. McDonogh expresses his opinion that at the time of the act in question the prisoner was suffering from *dementia præcox* of the hebephrenic type, a disease of the mind. He stated that that type of disease generally began at about the age of 13 or 14 years; is a gradual progressive disease, with indifference at first, irritable spells, lack of continuity of thought, vacant staring, silly smile, poor memory, and violent out-breaks of temper.

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The description of the prisoner's conduct and demeanour contained in the affidavits of the two nurses, Miss Kelly and Miss Shannon, is fully included in Dr. McDonogh's more comprehensive account of such conduct and demeanour.

The Crown made no attempt to contradict this description given by Dr. McDonogh or to question its accuracy, and it is clear that the case went before the jury as if the Crown had unreservedly admitted the accuracy of Dr. McDonogh's evidence as to the prisoner's conduct (which includes statements by him) and demeanour while in the hospital. If Miss Kelly and Miss Shannon had at the trial deposed to what they deposed to in their affidavits, no new facts would have been brought to the attention of the jury nor would any weight have been thereby added to the practically admitted accuracy of Dr. McDonogh's evidence as to the conduct and demeanour of the prisoner throughout his whole stay in the hospital; nor is there any ground for assuming that the exclusion of their evidence may have prejudiced the prisoner or occasioned any miscarriage of justice.

An affidavit of Dr. McLarty, one of the alienists for the defence, was filed, wherein it is stated that at the trial he was precluded from giving in evidence any of the findings and conclusions at which he arrived in his mental examination of the prisoner. We do not find in the notes of the trial any ruling of the trial Judge precluding Dr. McLarty from giving his opinion of the mental condition of the prisoner at the time of the act. The ruling was to the effect that in forming an opinion Dr. McLarty must disregard any acts and statements of the prisoner subsequent to the act. Dr. McLarty was permitted to give, and did give, as his opinion, that the prisoner at and prior to the act in question and at the trial was suffering from a mental disease called *dementia præcox* of the hebephrenic type, and that he did not know that his act was wrong. Thus the ruling of the learned trial Judge did not prejudice the prisoner in his defence.

The issue is not whether Brockenshire had the disease known as *dementia præcox*, but whether he had a disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of his act in shooting McQuillan or of knowing that such act was wrong.

The details of what occurred in the deliberations of the jury we do not know, but it is entirely consistent with their verdict that

they found in affirmation of the prisoner's contention that he was subject to *dementia præcox*, but found in addition that it did not render him incapable of appreciating the nature and quality of his act or of knowing that it was wrong. In other words, the question of the existence of *dementia præcox* was one only of various facts which the jury were bound to consider in determining the issue.

For the reasons above stated, the Court is of the unanimous opinion that no substantial wrong or miscarriage of justice has occurred, and that the provisions of sec. 1014, subsec. 2, should be applied and the appeal dismissed.

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*Judgment accordingly.*

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[APPELLATE DIVISION.]

DAVIDSON V. LAURENTIAN INSURANCE CO.

1931.  
Aug. 26.

*Insurance—Fire—Vacancy—Effect of statutory condition 5(d)—Increase of risk—Materiality.*

To an action on a fire policy the insurer raised the defence of vacancy for less than thirty days materially increasing the risk. This the insured answered by relying on statutory condition 5(d), the vacancy condition.

*Held* (LATCHFORD, C.J., dissenting) statutory condition 5(d) does not alter the law prior to its enactment, and vacancy for less than thirty days avoids the policy where it is shown to have materially altered the risk.

*Per* RIDDELL, J.A. (MASTEN, J.A., concurring) a material increase of the risk was here shown, ORDE, J.A. *contra*.

*Per* LATCHFORD, C.J., the effect of statutory condition 5(d) is to make an increase of the risk by vacancy for less than 30 days not material within condition 7.

AN appeal by the defendant company from the judgment of WRIGHT, J. (1931), *ante* 281.

June 15 and 17. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, J.J.A.

*Nathan Phillips*, K.C., for the appellant company, argued that prior to the enactment of the vacancy condition (R.S.O. 1927, ch. 222, sec. 98, statutory condition 5(d)), the law was that vacancy voided the policy where there was a change material to the risk and the onus was upon the insurer to prove the materiality of the change. The statutory condition did not abrogate this law, but merely altered it by making the policy void after a vacancy for thirty days, whether the vacancy was material or not, and leaving

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the first thirty days governed by the ordinary law. To imply the right to vacancy for thirty days under all circumstances would be changing the existing law, and an express statutory enactment would be required to produce this effect. Reference to Craies' Statute Law, 3rd ed., p. 105. The vacancy condition does not cut down the rights conferred by statutory condition 7, dealing with material change. Reference to *Sun Insurance Office v. Roy*, [1927] S.C.R. 8, as to proof of materiality.

*N. L. Mathews*, for the plaintiff, respondent, contended that the defendant company had not satisfied the onus of proving that the vacancy was material to the risk. It had not shewn that the vacancy of the insured buildings added to the risk. Reference to *Metcalfe v. General Accident Assurance Co. of Canada* (1929), 64 O.L.R. 643.

August 26. LATCHFORD, C.J.:—The evidence and authorities are so fully set forth in the reasons for the judgment of Mr. Justice Wright that it is unnecessary to repeat any of them.

While no case is directly in point, I incline to agree with the learned trial Judge that, as statutory condition 5(d) rendered the policy void after thirty days' vacancy, it followed that in the meantime the policy was in full force and effect. "Vacancy," as here, for less than thirty days may increase the risk. That, however, within the thirty days, is not such an increase in the risk as is contemplated by condition 7, but one of the contingencies insured against within the terms of the policy as affected by condition 5(d). I, therefore, think the appeal should be dismissed with costs.

RIDDELL, J.A.:—The facts seem clear; the plaintiff was insured by a policy of insurance in the defendant company against fire; his house and barn were burned on the 21st March, 1930, with their contents, the loss being very considerable. On an action being brought, the company defended on various grounds, the only one of which to be considered in this appeal being that the plaintiff abandoned the property, leaving it vacant, and thereby increased the risk. The learned trial Judge, Mr. Justice Wright, declined to give effect to this defence, on the ground that the vacancy had not lasted for thirty consecutive days, and applying, to exclude effect from a less period of vacancy, the provisions of the Insurance Act, R.S.O. 1927, ch. 222, sec. 98, statutory condition 5(d), which reads:—

"Unless permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring . . . when the building insured or containing the property insured is, to the knowledge of the insured, vacant or unoccupied for more than thirty consecutive days . . ."

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This condition, the learned Judge, not without doubt, read, on the principle of *Expressio unius, exclusio alterius*, as excluding avoidance of the policy on the ground of vacancy, unless the vacancy had lasted thirty consecutive days.

The effect of such a holding would be far-reaching, keeping the company liable even if the insured knew that his ceasing to occupy the property would with practical certainty render it liable to be set fire to, so long as he did not stay out of occupation for thirty days.

The statutory condition in question received its present form in 1924 by the Act 14 Geo. V. ch. 50, when for the first time clause (d) made its appearance, sec. 92 5(d): the former statutory condition 2, R.S.O. 1914, ch. 183, sec. 194, becoming statutory condition 7, with only unimportant changes.

The law in respect of non-occupation before the Act of 1924 was well settled; this was not, *per se* and *ipso facto*, a change material to the risk, no matter how long it might continue; but it might be proved to be material to the risk, and, if so proved, it was fatal, no matter how short it might be.

The Act of 1924, now substantially repeated in the present Act, continues the provision exonerating the insurer in the case of a change material to the risk, and full effect must be given to it, so far as it is not inconsistent with any other provision of the law. I can see no inconsistency in the law providing that in the case of a vacancy the insurer shall be bound unless it can prove that this was material to the risk; but, when it has continued thirty days, it will be relieved, no matter what the effect of the vacancy might be.

While due effect is to be given in a proper case to the maxim already quoted, care must be taken to see that the case in hand is one in which it is applicable: Broom's Legal Maxims, 9th ed., in dealing with the matter, p. 421, properly says: "Great caution is necessary in dealing with the maxim . . . for . . . it is not of universal application . . ."; *Saunders v. Evans* (1861) 8 H.L.C. 721, 729; *The Amalia* (1863), 32 L.J.P.M. & A. 191, at p. 194.

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Craies on Statute Law, 3rd ed., at p. 105, lays down the rule: "Express and unambiguous language appears to be absolutely indispensable in statutes passed for . . . taking away legal rights, whether public or private. . . ."

In *In re Cuno* (1889), 43 Ch. D. 12, at p. 17, Bowen, L.J., says:—

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"In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."

Craies, after citing this statement of the law, p. 109, continues:—

"Therefore rights, whether public or private, are not to be taken away, or even hampered, by mere implication from the language used in a statute, unless, as Fry, J., said in *Mayor, etc., of Yarmouth v. Simmons* (1878), 10 Ch. D. 518, 521, the Legislature clearly and distinctly authorise the doing of something which is physically inconsistent with the continuance of an existing right."

It is unnecessary to cite further authorities on this point, as they are fairly numerous and uniform in this sense.

The interpretation placed by the learned trial Judge on this enactment would make it take away, without language to that effect, the legal right of the insurer to be absolved from paying the insurance moneys, if it can prove that by vacating the premises the insured increased the risk.

I would allow the appeal with costs, and dismiss the action with costs.

MASTEN, J., agreed with RIDDELL, J.A.

ORDE, J.A.:—The learned trial Judge has, not without doubt, fortified his judgment by reference to my reasons in *Metcalf v. General Accident Assurance Co. of Canada*, 64 O.L.R. 643, at p. 651.

Now that case did not involve the question whether or not there had been any change material to the risk. What was in question there was, first, whether or not the house had ceased to be "occupied as a dwelling," those words being descriptive of the thing insured, and, second, whether or not the house had been vacant or unoccupied for thirty consecutive days, so as, *per se*, to have avoided the policy.

My observation in the *Metcalfe* case, at p. 651, quoted by the learned trial Judge, must be read with its context. It was not intended to express the view that the statutory condition 5 (d) had the effect of permitting vacancy for any period short of thirty days regardless of consequences.

In my view, while the statutory condition automatically avoids the policy where there has been, in fact, a vacancy for more than thirty consecutive days, it has not altered the law as to what state of facts constitutes a change material to the risk; and it is clear from the authorities that, while vacancy *per se* is not a change material to the risk, the circumstances under which the vacancy occurs may constitute such a change. I find myself, therefore, unable to agree with my Lord the Chief Justice as to the effect of the statutory condition.

But, while I disagree with my Lord on this point, I find myself unable to agree with my brothers Riddell and Masten as to the sufficiency of the proof that the vacancy in this case was material to the risk. The burden was upon the insurance company to establish this defence. The evidence to that end was that of three insurance officials, one of them the manager of the defendant company. They all said that insurers regard vacant farm property as a bad risk, because of the danger of fire from trespassers, such as tramps, boys, and others out of work—there being no caretaker and no supervision over the property—and that in practice insurance companies refuse to insure vacant farm buildings at all. But no evidence was given that the buildings in the present case were in fact subject to any such greater risk.

Now, assuming that as a general rule farm buildings are not as safe a risk when vacant as when occupied, and that the practice of refusing to insure such risks is justified, I am not prepared to assume that it therefore follows that leaving every farm-house vacant constitutes such a material change as to avoid the policy. The risk is the thing insured, not the chance of loss, and it is not enough, in my judgment, to shew that in practice or as a matter of experience vacant farm-houses are not safe risks for insurers, but it must be shewn that the vacancy materially changed the risk as to these particular buildings. For example, to leave a building unprotected in the face of a near-by conflagration, when to remain might have saved it, might well be held in the circumstances to constitute a material change. But it can hardly be that every

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 1931. occupied to go to the theatre. During their absence the house is  
 DAVIDSON burned from a fire which might have been put out in time had  
 v. the family been at home. It is difficult to think that the tem-  
 LAURENTIAN porary vacancy, while it increased the hazard, would be held to be  
 INSURANCE a material change. Or a man gives a party to a large number of  
 Co. young people all of whom are smoking cigarettes. The fire hazard  
 Orde, J.A. is increased, but would that constitute a change material to the  
 risk?

There is not a tittle of evidence here to shew that the risk of fire was in fact increased by the fact that no one was occupying the farm-house. If the whole truth were known, the vacancy might have reduced the hazard because of the absence of the customary fire risks, such as stoves, lamps, tobacco, etc.

In my judgment, in order to succeed, the defendant company must do more than was done in this case, and must prove that in some way the vacancy added to the risk with regard to the particular buildings insured by the policy in question.

For this reason I think the appeal should be dismissed.

*The Court being divided, appeal dismissed with costs.*

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[APPELLATE DIVISION.]

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*Copyright—Infringement—Claim also for conversion—Facts and evidence—Failure to establish—Statutory copyright — MS entrusted to defendants—Implied undertaking—Cause of action for breach.*

The plaintiff claims that she placed the MS of a certain unpublished work called "The Web," of which she had obtained interim copyright, in the hands of certain of the defendants and they refused to return it on demand, that these defendants illegally used the MS by exposing and exhibiting it to the defendant Wells, and that all the defendants violated her rights of copyright in a book written by Wells called "The Outline of History."

*Held* that on the facts and evidence all the plaintiff's claims fail.

*Per* RIDDELL, J.A.—If the necessary facts were established and the disclosure to Wells were proved, the plaintiff would have a good cause of action. The plaintiff is not confined to the statutory copyright she had obtained but may rely on an implied undertaking that the defendants to whom she had submitted the MS should not part with it or publish it: *Chappell v. Purday* (1845), 14 M. & W. 303,

316; *Jefferys v. Boosey* (1854), 4 H.L.C. 915, 920; *Walter v. Lane*, [1900] A.C. 539, 550; *Coppinger on Copyright*, 6th ed., pp. 1, 21, etc., referred to.

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THE plaintiff, Florence Deeks, of Toronto, by this action charged the defendant H. G. Wells, of England, with literary piracy, and the MacMillan Company of Canada as an accessory before the fact and as a co-conspirator with Wells. George Newnes Ltd. and the Cassells Company Ltd. were made defendants as publishers of the defendant Wells' book, for the purpose of an injunction and accounting. The action as against the MacMillan Company of England, also made a defendant, was dismissed before the trial.

The action was tried before RANEY, J., without a jury, at a Toronto sittings.

*R. S. Robertson*, K.C., and *P. E. F. Smily*, for the plaintiff.

*W. J. Elliott*, K.C., and *E. V. McKague*, for the defendants Wells, George Newnes Ltd., and the Cassells Company Ltd.

*R. D. Moorhead*, K.C., and *W. W. McLaughlin*, for the MacMillan Company of Canada Ltd. and the MacMillan Company of New York.

September 27, 1930. RANEY, J.:—The plaintiff is the author of the manuscript of an unpublished book, "The Web," the theme of which is feminism in history. The scope of her work is world-wide, and ante-dates the advent of man upon the earth; the manuscript is necessarily voluminous.

The defendant Wells is the author of many well known books, including a work having the title, "The Outline of History" This is also a history of the world and is more voluminous than the plaintiff's manuscript.

After about four year's work, the plaintiff completed her manuscript in 1918, and early in August of that year she submitted it, looking to its publication, to the defendant the MacMillan Company of Toronto, in whose custody it remained for several months. Miss Deeks says it was returned to her in April, 1919; the company's records indicate that it was returned in February, 1919. It is not important for the purposes of this action to determine which is the correct date. At all events the manuscript was with the MacMillan Company of Toronto, or under its control, for six months beginning with August, 1918.

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Mr. Wells began the writing of his book in the late autumn of 1918, some two or three months after Miss Deeks' manuscript was left with the MacMillan Company in Toronto. Before beginning to write, Mr. Wells had offered the publication rights of his book for Great Britain to the MacMillan Company of England and that company had declined the offer. Then he arranged for publication in England by the Newnes Company, and for publication on this side of the Atlantic by the MacMillan company of New York. Incidentally, the MacMillan Company of England controls both the MacMillan Company of New York and the MacMillan Company of Canada.

Between August, 1918, and February, 1919, there was time enough for the forwarding of Miss Deeks' manuscript to England, its use by Mr. Wells and its return to Toronto. That is the plaintiff's theory of what actually happened; but there is no evidence that the manuscript was sent to England, or that Mr. Wells or any one else in England knew of its existence, or that the MacMillan Company of Toronto, or any one else in Toronto, knew that Mr. Wells was writing, or had it in mind to write, a history of the world. In the absence of such evidence, the plaintiff seeks to make her case by pointing to similarities in the two works which, she says, are so significant as to leave no manner of doubt that Mr. Wells had access to her manuscript.

The plaintiff is not able to point to any paragraph in "The Outline of History" that corresponds verbally with any paragraph in her manuscript, or even to any sentence; but she alleges that the general plan of Mr. Wells' book establishes the use of her manuscript, and she points to the use of many ideas and words used by her that were afterwards used by him. The absence of identical paragraphs or sentences, or even of phrases, only goes to establish, she says, the care that was taken by the pirate to conceal the source of his ideas and language.

At the trial the plaintiff called three literary men as expert witnesses. The first was Mr. William A. Irwin, associate professor of oriental languages in the University of Toronto, who had worked on the matter of the comparison of the two works "rather intensively," for six months. In his opinion the evidence was overwhelming that Miss Deeks' manuscript was in the hands of the author of "The Outline of History" when he wrote the manuscript of his book. Professor Irwin had prepared before the trial

a memorandum embodying the result of his labours, covering 60 odd typewritten pages. This he was permitted to read at the trial as part of his testimony. Perhaps I could not better summarise the effect of his evidence than by quoting some sentences from it.

After noting that the two works have the same scope, beginning in each case with the formation of the solar system; that their plans are similar; that they have the same theme or purpose, namely, "man's struggle for social values;" that both are sadly out of balance by giving undue emphasis to Western civilisation; that both present the old La Place theory of the origin of the solar system; that both offer very unsatisfactory treatment of Israel and Judea; that "both neglect Tamerlane," and so on,—he descends to details (exhibit 15, p. 11):—

Both start with a floating (or spinning) cosmic body which both describe as 'a speck' comparatively (or as it seems to us), which though vast (or prodigious) is small in the 'greater vastness (or immensity) of space.'

"Now these two sentences are identical. It is quite out of the question that they arose independently. There is certainly some common source or suggestion back of their resemblance. But we go on. 'Web' here is speaking of the sun; 'Outline' of the earth, but at the foot of p. 5 it turns to tell of the sun. And there it gives us palpably and identically the same sentence of 'Web,' reshaped it is true, but retaining an astonishing verbal identity. Note these parallels and resemblances:—

'Web.'	'Outline.'
In the beginning;	Vast ages ago;
floated;	spinning;
concentrated into a focus of	concentrated into a compact
heat and light;	centre of heat and light,
masses of cosmic matter.	mass of matter.

"The full effect is secured best by reading the two sentences in close sequence. It is seen both start in the primoidal ages when the sun was but a 'flaring mass of matter,' or a 'prodigious nebulae' which later 'concentrated into a focus (or compact centre) of heat and light.'

"It is to be observed then that both immediately ('Web' in the next sentence, 'Outline' in this same one) speak of the formation

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of the planets by the detachment of certain fragments. Both mention the earth as one of these and both refer verbally in this same context to the solar system.

"Now these passages take us a step further. The inter-relation here cannot be explained as dependence upon a common mere suggestion; the dependence is documentary. Either, one is dependent upon the other or both have used a common written source and followed it closely . . . . ."

But the fact is that the significant phrases which Professor Irwin selects from "The Web" for his parallel columns—"concentrated into a focus of heat and light," and "masses of cosmic matter"—were lifted bodily by Miss Deeks from Duruy's "General History of the World." True, as Professor Irwin points out, Mr. Wells did not use Duruy as one of his authorities, but Duruy, who was Minister of Public Instruction in France under the Third Napoleon, was an eminent historian of international repute, and his "General History of the World" was, and remains even to-day, a classic. It was translated into English many years ago, and a new edition of it has been issued within the past five years. Duruy has in fact been a mine for later historical writers. In the introduction to his book, Mr. Wells disclaims any pretence to being himself a historian, but he claims to have read sedulously and to have made the utmost use of all the help he could obtain, and he mentions scores of literary men to whom he was indebted in one way or another. If Mr. Wells had been a historian he would have been familiar with Duruy. But some of his associates were historians and were undoubtedly familiar with Duruy, and there appears to be plain evidence of the influence of Duruy in the opening chapter of "The Outline of History."

Then Professor Irwin's memorandum proceeds (page 13):—

"Now it is to be granted that the detailed plans of the entire passages in the two works differ considerably, but yet the difference is such as might well evolve from the scheme of 'Web.' Starting with the earth, as against the sun in 'Web,' 'Outline' runs through just about identically the ideas of 'Web,' expanding the conception of the vastness and emptiness of space, and the smallness of the locale of life, and then returns to 'Web's' scheme and goes through it again this time in full imitation centring upon the sun. So mainly one of reduplication. . . . ."

"The conclusion is inescapable. We have here documentary interdependence; no brushing aside as 'common knowledge' will suffice. Close, detailed, even verbal and phrasal identities such as we have here in such numbers do not arise other than by documentary interrelation. The question then remains of the identification of this documentary authority. Miss Deeks puts forward Duruy's 'General History of the World' as her one source. Certainly she drew from it and drew heavily. But Wells contends in his evidence that he did not use nor even know Duruy, and indeed at several points his work agrees with Miss Deeks' as against Duruy. The possibility of another writer having drawn on Duruy with the same heavy dependence of Miss Deeks, and yet by coincidence having adopted the same features of original divergence from his, is so remote as to merit no consideration. Still stronger is the improbability of some source back of Duruy which will explain the similarities of 'Web' and 'Outline.' The argument then is simple: the similarities of 'Outline' to 'Web' are due to some documentary source which Mr. Wells used. That source was not Duruy, it was not a source of Duruy, it was not some unidentified dependant of Duruy; there is no possibility left but that it was 'Web.' Briefly, these two parallel passages prove conclusively that Mr. Wells used Miss Deeks' work. If that be all the case requires we need go no further unless indeed to swell the total of evidence.

"There is, though, yet another phase of the question: How did he use it? The answer demands no intricate argument. The detail of verbal similarities, the identity in order of minor ideas, the sentences of similar structure shew clearly that Wells' rewriting of Miss Deeks' story is not a re-telling of a remembered account read yesterday or even an hour ago. Making all allowance for possible unusual feats of memory, the situation quite clearly was that the manuscript of 'Web' was at hand as he wrote, if indeed it did not actually lie open before him. In any case his reading of this particular passage of it was so recent that his writing was to all intents and purposes a copying and expansion thereof."

Professor Irwin then undertakes "to swell the total of the evidence." He finds the first item of such evidence in the treatment given by the two authors to "our ancestor." Here is the parallel:

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"millions of years;  
 an animal with a relatively  
 enormous brain case;  
 a skilful hand;  
 dwelt in caves and trees and  
 roamed the forest;  
 feeding on nuts and fruits;  
 much the same as the man-like  
 apes of Boreo to-day;  
 tendency to throw stones,  
 flourish sticks, and in gen-  
 eral defeat aggression;  
 emerged from the animal into  
 mankind.

"millions of simian genera-  
 tions;  
 one particular creature . . .  
 It was small-brained by our  
 present standards, but it  
 had clever hands;  
 it clambered about the trees  
 and ran, and probably ran  
 well on its hind legs on the  
 ground;  
 it handled fruits and beat nuts  
 upon the rocks;  
 it was half ape, half monkey;  
 caught up sticks and stones  
 to smite its fellows;  
 it was our ancestor.

A page or two of argument follows, and then Professor Irwin sums up the matter of these two parallel columns thus: "So we find conclusive evidence here again that Mr. Wells has taken a passage from Miss Deeks, only thinly disguising his plagiarism by a few slight alterations. And as above, this is written so immediately from Miss Deeks' passage that he must have turned practically direct from her manuscript to his own writing."

As professor of Oriental languages, Professor Irwin is more at home in Egyptology than in astronomy, or anthropology, or cosmology.

In an earlier paragraph of his memorandum he had dwelt upon dissimilarities of the two works. He had said:—

"On first glance at the two works one is impressed most, not with their similarities but with their differences. . . . The thread of the account, the actual phrasing and succession of ideas, are such that it would probably never occur to the casual reader that there might be any significant similarity whatever. It is to be admitted in regard to my own study that at just about this point I was ready to hand the material back to Miss Deeks and report to her that I could see nothing relative to her charges. But just then I hit upon certain peculiarities in the account of a period with which I am familiar. They were so strange as to carry strong presumption of interrelation. They proved the clue in following up of

which I have found another side to the comparison of the two works; a side of remarkable similarities.”

At page 27 of the memorandum, Professor Irwin proceeds to state what the clue was to which he had made the earlier reference:—

“In regard to these (Egyptian) names, there is, though, a much more important feature: perhaps the most important single feature of the two accounts of Egypt, and indeed of such a character as in itself almost to prove interdependence. Incidentally, it was this which first arrested my intention to hand back Miss Deeks’ manuscript with a negative report. It is the name ‘Hatasu;’ ‘Web’ characterises her as ‘regent,’ ‘Outline’ properly as ‘queen.’”

The point which Professor Irwin makes, and which he here emphasises, is that Miss Deeks and Mr. Wells both spell the name of this Egyptian queen in the same way. He proceeds:—

“Though I have worked in this field for twenty years, I never saw or heard of that name until I met it here. It appears in none of Wells’ authorities, nor in any other authority of recent times. Only by special investigation did I discover it and that in old histories of 1890 and earlier. Since that time the accepted form of the name has been Hatshepsut.”

But the matter is not at all recondite. In point of fact Professor Irwin himself suggests the simple explanation. Neither Miss Deeks nor Mr. Wells was an Egyptologist, and may it not be that both followed the spelling of an author, or of authors, who wrote earlier than 1890? As a matter of fact Miss Deeks herself followed the spelling of Duruy, who wrote about 1850.

Another lady of ancient history contributes a page or two to Professor Irwin’s argument. The lady is Aspasia, who was a friend of Pericles. I quote again from Professor Irwin’s memorandum (page 44):—

“‘Outline’ on p. 345 says of Aspasia’s relations with Pericles that for legal reasons he could not marry her, but she was ‘in effect his wife’—a most astonishing phrase. The temper of to-day does not hesitate to use a more unpleasant word. Why did not Mr. Wells say frankly that she was his mistress? Why did he not call her a ‘courtesan’? Both epithets are applied in Encyc. Britt. articles—and Mr. Wells, by his evidence, leaned heavily on the Encyclopædia. That he should have refrained through delicacy or modesty in ludicrous. Julius Cæsar’s relations with Cleo-

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patra were much the same and Wells has stigmatised them as 'amorous pleasantries' (p. 510). Plutarch, too, to whom Wells refers, makes it clear that Aspasia's character for even that age of easy morals was not above reproach, and that she drifted about readily from one man to another. Then why was she 'in effect' Pericles' wife? The qualifying phrase 'in effect' reveals that Wells felt there was something wrong. He knew the nature of her position, yet he persists in calling her a wife. Why so? He didn't need to bring in the idea of marriage here at all—he didn't for Cæsar. Weighing all the possibilities, it seems most probable that the astonishing rendering is due to the influence of a source which Wells is following. And it is remarkable that this odd idea appears in 'Web' also, save that there it is presented without apology. We are told that Pericles 'married' Aspasia.

"Now it is notable in itself that both these works should mention Aspasia at all: she was quite unimportant. She is completely ignored in such survey histories as Breasted, Browning (Wells' sources), and Goodspeed. How much more remarkable that both should have this odd idea of marriage to Pericles. But further: the entire accounts of her run closely parallel. Thus:

'Web.'

Knowledge of politics;  
Influence upon her husband;  
Made her house a resort for  
learned and distinguished  
men;  
Anaxagoras . . . etc. re-  
joiced to be in her society  
and to learn (of) her.

'Outline.'

Her wisdom;  
Accused of instigating a war;  
Gathering about him men of  
unusual gifts;  
All the great men knew her  
and several have praised  
her."

These extracts from the evidence of Professor Irwin will serve, and on the strength of these and many other like and perhaps less significant coincidences which he enumerates—having, as he says, "sought throughout to weigh the matter judicially"—he reaches the following final conclusions (p. 65):—

1. Mr. Wells had read Miss Deeks' manuscript before commencing his work on what we now know as "The Outline of History."

2. He analysed her manuscript and made written notes of features which attracted him.

3. With but unimportant revision he adopted this analysis as a plan for his own writing. His use of the plan of "Web" was such as to justify the epithet "slavish."

4. Certain passages of "The Web" he took over in detail. He rewrote them in such fashion as might be hoped to obscure their dependence, but they remain a palpable copying.

5. He kept her manuscript readily available as he wrote, apparently at times it was actually open before him; and he made frequent reference to it.

6. He used "The Web" as his chief source and authority. He followed it very much more closely and continuously than he did any of the works to which he refers. Indeed some of these I can find no evidence of use whatever. His citation of them is more than a "bluff."

So strong was Professor Irwin's self-persuasion that he could visualise Mr. Wells sitting at his desk writing the manuscript of his book with the Encyclopædia Britannica at his right hand, Robinson's "Mediæval and Modern Times" at his left, and Miss Deeks' manuscript in front of him.

After enumerating his conclusions as above, Professor Irwin proceeds to make an argument as follows (p. 66):—

"How and why Mr. Wells came to make this use of 'The Web' is a question that obviously I am unable to answer fully. There is some light shed upon it, however, by this examination which we have been pursuing, particularly when supplemented by his evidence given last summer. He claims, as we have already noted, that the writing of a history of the world was an ambition of his of many years, but that prior to 1918 he never formulated definite plans for the book. This ambition may have been developing in his mind during the course of the Great War; or again it may have been still as vague and remote as it had remained for years, when in the summer of 1918 the manuscript of 'Web' came into his hands.

"In any case the reading of Miss Deeks' work would be just the stimulus required to bring these old intentions to a focus of decision and action. It is quite clear that he regarded Miss Deeks' manuscript very highly; no man would make such extensive use of it otherwise. It must have roused him to a realisation of the possibilities in publishing such a work at that time. But this is to be considered as well: having undertaken the project, he wrote

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Raney, J. under very high pressure. The published 'Outline' bears indubitable marks of hasty production. Moreover, the time which his evidence allows for the actual writing strongly corroborates this. Somewhere about October of 1918 he is fairly started; by the next July the work is completed save for some minor revision. In about nine months he produced a manuscript of about half a million words, surveying all the intricate and recondite subjects entailed in a history, not of mankind alone, but of the Earth. It is simply stupendous. And if I understand aright his testimony he denies that he dictated to stenographers; on the contrary he wrote it entire himself in longhand. To do that in a bare nine or ten months is a task that might well stagger one. The mere writing was exacting. There could have been no time whatever for exhaustive reading, for collation of authorities and maturing of views and modes of presentation. These things can be done only through years of quiet work, not in a few hectic months of feverish activity. He made his task one of urgency, snatched hastily at facts and views drawn from where he might, padded it out with old hobbies and half baked opinions of his own and feverishly kept his pen-hand busy.

"Why he rushed the work through at such a pace he does not say, but the fact that he did so is established. For some reason he felt that speed was of importance. It may have been that he felt the market was peculiarly ripe for his purpose, and he must hasten before the public mood changed; it may be too that it is his habit to work in this hasty fashion. But there is no evidence against the view, and probabilities favour it strongly, that his reason was an anxiety to forestall the publication of 'Web.'"

If I were to accept Professor Irwin's evidence and argument, there would only remain for my consideration the legal questions involved in the piracy of a non-copyrighted manuscript. But the extracts I have quoted, and the other scores of pages of Professor Irwin's memorandum, are just solemn nonsense. His comparisons are without significance, and his argument and conclusions are alike puerile. Like Gratiano, Professor Irwin spoke "an infinite deal of nothing;" his reasons are not even "two grains of wheat hidden in two bushels of chaff." They are not reasons at all. There could not be an original history of the World, unless perhaps the "Compendium of Universal History," said to have been written by Macaulay before he was eight years old, might lay claim

to that distinction. All universal histories must, necessarily, be based upon the writings of previous authors. That was true both of Miss Deeks' manuscript and of Mr. Wells' book. Every writer of such a work will deal with facts that were dealt with by previous authors; will discuss ideas that were often discussed before; will use words and perhaps phrases that had previously been used many times. The only phrase that I recall that appears both in Mr. Wells' book and in Miss Deeks' manuscript are the words "the little expedition" used by both authors in speaking of the three caravels with which Columbus set sail on his voyage of discovery in 1492. A good deal was made by Professor Irwin of this coincidence. But such coincidence many times repeated, standing by themselves, would be no evidence of plagiarism from Miss Deeks.

Other literary witnesses called by the plaintiff were Mr. Lawrence Burpee, editor and historian, and Mr. George S. Brett, Professor of Philosophy in the University of Toronto, Oxonian, and formerly Professor of Ancient Languages in Trinity University, Toronto. These gentlemen, like Professor Irwin, are men of excellent standing in the Canadian literary world, and undoubtedly qualify as experts in their respective fields. In a general way Mr. Burpee and Professor Brett endorsed the evidence of Professor Irwin, but with less positiveness. Mr. Burpee also read in a memorandum as part of his evidence. I quote the concluding paragraph:—

"In regard to similarities in the actual language employed by the authors of 'The Web' and 'The Outline'—that is, the presentation of similar ideas in the same sequence, and clothing them in substantially the same form of words—the instances are far too numerous to even begin to present them here. In this respect, probably more than in any other, the significance of the comparison lies not so much in the individual example, which in itself may be often insignificant and unconvincing, as in the piling up of many such instances. Once more, it is the cumulative effect of very many similarities, in this as in other directions, that compels one to the conclusion that some of those who were engaged in preparing material, at some stage, for 'The Outline,' must have had access to the manuscript entitled 'The Web.'"

Many famous authors have been accused of plagiarism; even the Evangelists have not escaped, and numerous volumes in many languages have been written to prove that the author of Matthew copied from Mark, or Mark from Luke, or Luke from Mark, and

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so on; and each commentator has made out a case to his own satisfaction. The classic illustration is the parenthesis in the account of the healing of the man sick of the palsy "(then said He to the sick of the palsy):" see Matthew 9-6; Mark 2-10; Luke 5-24. But this illustration obviously proves nothing, except that the parenthesis came from a common source—whether that source was Matthew or Mark or Luke or some writer anterior to all three.

The defendants were not, I think, called upon to offer any evidence to rebut Professor Irwin's fantastic hypotheses, but Mr. Wells and the MacMillan company of Toronto preferred to offer evidence.

Mr. Wells' evidence was a flat denial. He had never seen or heard of Miss Deeks' manuscript. The evidence of the witnesses called by the MacMillan company satisfies me of the good faith of that company and that no improper use was made of Miss Deeks' manuscript.

The action fails and must be dismissed.

That leaves only the question of costs for consideration.

The alleged cause of action arose in 1918, or early in 1919, the writ was issued in October, 1925, and the action was brought to trial in June, 1930; there were commissions to New York and London; the examinations for discovery ran into thousands of questions, and the trial lasted four days. The costs will be heavy.

There is no doubt that when the plaintiff brought her action, as at all times since then, she believed in the wickedness of the MacMillan Company of Toronto and of Mr. Wells; this belief was a growth, dating from the time when Miss Deeks first saw "The Outline of History" after its appearance in Toronto in 1920, and as time passed it became an obsession. That she was not in a condition of mind to judge fairly of the very serious charges she was bringing against a reputable publishing house and an eminent and respectable author ought to have been obvious, to her literary and legal advisers. It was a serious matter to spread her charges on the face of court proceedings; it was a serious matter that those charges should have stood without an opportunity to the defendants publicly to answer them for more than five years, that is to say until the trial of the case.

The law gives a plaintiff a wide privilege as to what he may say about a defendant in his pleadings and proceedings. No matter how libellous the charge, the defendant has no recourse by way

of action for damages if it turns out at the trial that the defamatory matter was groundless—as it has turned out in this case. That wide privilege is thought to be in the public interest. Clearly it would not be in the public interest if it were often abused as it has been here.

This action ought not to have been brought; having been brought, it ought to have been discontinued after the examinations for discovery, and certainly it ought not to have been brought to trial. As it is, I have no alternative but to give the defendants their costs.

The plaintiff appealed from the judgment of RANEY, J.

May 13, 14, and 15. The appeal was heard by Latchford, C.J., Riddell, Masten, and Orde, JJ.A.

The appellant, in person, argued that the learned trial Judge should have found that the defendant Wells had plagiarised “The Web” in his “Outline of History.” This could be deduced from similarity of language in the two works; common inclusions; common omissions; common mistakes; physical impossibility of the “Outline” being written independently of the “Web” in the few short months upon which Mr. Wells was engaged in writing the former book; similarity in plan and contents of the two works. The evidence led to the conclusion that the MacMillan Company of Canada Ltd. had illegally used the manuscript of the “Web” by exhibiting it directly or indirectly to the defendant Wells. All the defendants had violated her copyright. The learned trial Judge failed to give proper weight to the evidence of the expert witnesses who were called on her behalf.

*W. Elliott*, K.C., and *E. McKague*, for the defendants Wells, George Newnes Ltd., and Cassels & Co. Ltd., respondents, contended that the learned trial Judge was right in his findings and in his conclusions of law. The plaintiff had failed to prove her case. There had been no direct evidence presented to shew that Mr. Wells had been guilty of plagiarism, and, in the face of his express denial, no inference of plagiarism could be drawn from the alleged similarities of language or mistakes or omissions. Such similarities as existed could as easily have come from common sources of knowledge of the two authors as from one copying the other. There could be no copyright in ideas. The plans of the two works were different. “The Web” treated of the influence of woman on history; of feminism. The defendant Wells’ book was

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an outline of general history. The trial Judge was right in characterising the arguments and conclusions of the experts who were called for the plaintiff as "puerile." Reference to Copinger on Copyright, 6th ed., p. 117; *Pike v. Nicholas* (1869), L.R. 5 Ch. 251; *Cartwright v. Wharton* (1912), 25 O.L.R. 357; *Garland v. Gemmill* (1887), 14 Can. S.C.R. 321; *Badische Anilin und Soda Fabrik v. Basle Chemical Works Bindschedler*, [1898] A.C. 200.

*R. D. Moorhead*, K.C., and *McLaughlin*, for the defendants the three MacMillan Companies, respondents, contended that the plaintiff had not established by evidence that these defendants had withheld her manuscript from her or had made any illegal use of it by handing it over either to the defendant Wells or to any intermediary through whom he had obtained possession of it.

August 26. RIDDELL, J.A.:—An appeal by the plaintiff from the judgment of Mr. Justice Raney at the trial. This appeal was argued with great ability and candour by the plaintiff in person—an ability and candour likewise exhibited by counsel for the respondents.

The plaintiff is an author residing in Toronto, who, after some years of writing, produced a work which she entitled "The Web," the object and design of which was, as she says, "to feature feminism in history . . . the woman and her work in history . . . the predominating influence in the world," because "History in general has never had woman's position incorporated in it as a whole, and I endeavoured to do it as a whole." We may, for the purposes of this action, disregard the two revisions of 1920 (or 1921) and 1923 (or 1925), as not coming in question in this action.

Of this work, she obtained an interim copyright under the above name, on the 28th June, 1916, under the provisions of the existing Copyright Act, R.S.C. 1906, ch. 70.

In this action, she claims (1) that she placed the MS. of this work in the hands of certain of the defendants and that they withheld it after demand made (a simple action in trover); (2) that these defendants illegally used the MS. by exposing and exhibiting it to the defendant Wells; and (3) that all the defendants violated her rights of copyright in a book written by the defendant Wells.

The facts are that she, having (at least tentatively) finished her MS. and desiring to publish it, asked the MacMillan Company of Canada at their Toronto headquarters, whether there was any

objection to her using certain material from a publication of theirs: to determine that question, the MS. was handed to Saul, their manager at Toronto; after some correspondence, Saul, being about to leave his existing employ, wrote the plaintiff, on the 31st January, 1919:—

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"I am leaving the manuscript here at your disposal, and if you will inform the MacMillan Company what you wish done with it, your wishes shall be carried out."

There had been no previous request for the return of the MS.; and when this letter was received by the plaintiff, she made no reply, did not call, write or telephone, because, as she says:—

"I was busy at other things, and I was not revising, and I think I had lost interest in it and I think I just let it go for the time being."

Later on, in March, 1919, after some correspondence with the new manager, she was invited to call, and did so—then she received her MS. at the first request.

It would savour of absurdity to base a claim of conversion on these facts, and the first of the three causes of action alleged falls to the ground.

The second cause of action alleged is based upon the proposition that certain defendants, the MacMillan Companies, having received from her the MS. for the specific purpose mentioned, disclosed its contents, either by sending the MS. itself (which is the belief of the plaintiff) or a copy of it to England, and disclosing its contents to the defendant Wells, or to some collaborator or collaborators of his, whereupon use was made of such contents in the composition of the Wells work, "The Outline of History."

Were the facts of such disclosure established by evidence, there can be no possible doubt that the plaintiff would have thereon a good cause of action, whether on the ordinary law of bailment or the common law principle of copyright, using the word in a different connotation from that which is usual—the principle is mentioned in such cases as *Chappell v. Purday* (1845), 14 M. & W. 303, 316; *Jefferys v. Boosey* (1854), 4 H.L.C. 815, 920; *Walter v. Lane*, [1900] A.C. 539, at p. 550, and in *Copinger on Copyright*, 6th ed. (1927), at pp. 1, 21, etc.; and will be more particularly considered *infra*.

No pretence is made of anything like direct evidence that such a wrong was committed by any defendant, and the defendants repudiate the proposition in its entirety. The plaintiff admittedly

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 1931. the practical impossibility of advantage being taken of the plain-  
 DEEKS tiff's MS. in any other way than is charged.

v. It must be said that, if these two propositions were established  
 WELLS. by evidence, the argument would be very strong, if not, especially  
 Riddell, J.A. in view of the somewhat unsatisfactory evidence of Saul, irresistible. But the plaintiff herself says that she had two MSS. of her work, of which the one she gave to the MacMillan Company she had previously given to another Toronto house, who had it a week, more or less; and of the other, she says, "Oh, I kept that and gave it to somebody else." No account of this copy is given; and it is plain, I think, that the impossibility of the contents of the MS. becoming known, if they ever were known, through some other channel, is not proved. Any argument, then, based upon such an impossibility falls to the ground.

The plaintiff, to succeed, must, it was contended by the defendants, rely upon the statutory right of copyright—the common law right being of course merged in this statutory right: *Donaldsons v. Beckett* (1774), 4 Burr. 2408.

In this view, "There can be no copyright in ideas or information, and it is no infringement of copyright to adopt the ideas of another or to publish information derived from another, provided there is no copying of the language in which those ideas have, or that information has, been previously embodied." Copinger, *op. cit.*, p. 31; *Hollinrake v. Truswell*, [1894] 3 Ch. 420; *Walter v. Steinkopff*, [1892] 3 Ch. 489; *Chilton v. Progress Printing and Publishing Co.*, [1895] 2 Ch. 29; and other cases. *Corelli v. Gray* (1913), 30 Times L.R. 116, which may seem *contra*, rests upon a specific provision of the English Act not applicable here.

I had been impressed with the strength of this argument, and, indeed, the argument proceeded largely on that basis, but a careful consideration of the law has led me, both on principle and authority, to the conclusion that it may well be that the copyright secured by the plaintiff has not deprived her of the common law right which is thus expressed, with a reference to *Chappell v. Purday*, 14 M. & W. 316, and *Jefferys v. Boosey*, 4 H.L.C. 920, in Copinger on Copyright, *op. cit.*, p. 1, note (a): "The author of a literary composition, which he commits to paper belonging to himself, has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies

which he chooses to make of it for himself, or for others. If he lends a copy to another his right is not gone; if he sends it to another under an implied undertaking that he is not to part with it or publish it, he has a right to enforce that undertaking."

I think that in the present case, the plaintiff is in that position, that the MS. having been placed in the hands of the Company in Toronto for a specific purpose only, any use by them of it for any purpose was a breach of their implied undertaking—and that any one whosoever who made use of it for such other purpose was in law equally liable to an action.

Wells had no right to make any use whatever of the MS. and if he did so and damage accrued to the plaintiff from such use, she has a right of action against him. The same right I shall consider without deciding the point exists also as against the other defendants. The case will be discussed on the basis of the law being as just stated.

In addition to an elaborate collection of what are claimed to be passages violating the plaintiff's statutory right and a very careful and skilful presentation of them by the plaintiff, we have the evidence of some gentlemen who give expert evidence. Without quoting the alleged maxim of a well-known English Judge as to expert witnesses, I am wholly in accord with the view of the trial Judge as to the weight to be given to this evidence in this case.

The first of these experts is a Professor of Oriental Languages in the University of Chicago—he has no high opinion of Wells's book—it is, he thinks, "a very shoddy ill-digested piece of work, devoid of literary excellence," with "erratic features" and "striking deficiencies and inaccuracies," without "adequate excuse," disregarding "all canons of historic sense and propriety," whose author "shews strange obtuseness;" he actually "squanders a whole page on two quite unnecessary biblical quotations," and gives Saul only "five lines after squandering three pages on quotations;" and some of the "contents (of his book) betray an incredible ignorance of the subject," but are "a mere bluff of the topic"—he "made his task one of urgency, snatched hastily at facts and views drawn from where he might, padded it out with old hobbies and half-baked opinions of his own," and "feverishly kept his penhand busy" for "a few hectic months of feverish activity," and "his reason was an anxiety to forestall the publication of the 'Web'." Of course in the two works "there must of necessity be hosts of

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App. Div. similarities" and sometimes "We must concede a large freedom  
 1931. in Mr Wells' details . . . freedom from Miss Deeks." Still  
 DEEKS he must say that the "evidence is overwhelming that it (the 'Web'  
 v. MS.) was in the hands of the author of 'Outlines of History'  
 WELLS. before he wrote and during the time he was writing"—"We must  
 Riddell, J.A. conclude he used the 'Web'"—there is "clear proof of documentary  
 inter-relation." Sometimes, indeed, Wells makes statements which  
 are "suspiciously of the character of 'common knowledge'," and  
 of course sometimes "it is not necessary here to postulate the open  
 manuscript of 'Web' at hand as he wrote," but after all "it is  
 proven beyond a doubt that Mr. Wells had access to Miss Deeks'  
 manuscript . . . the manuscript of 'Web' was at hand as he  
 wrote and . . . his reference to 'Web' was no chance or spor-  
 adic thing, but that the manuscript was . . . constantly  
 available, lying close at hand on his work-table, and referred to  
 repeatedly if not steadily throughout the course of his writing.  
 Sometimes it lay open before him and his writing was palpably  
 a disguised copying of Miss Deeks' passage." There is "the full  
 cogency of Mr. Wells' indisputable use of 'Web'" . . . "that  
 it was in his possession in October is quite certain" or "it may have  
 been in November." "He must have known that he could retain  
 the manuscript in his possession for but a limited time." The  
 witness rather doubts "that for all his professions Mr. Wells used  
 'Breasted' at all," and he is convinced "that his citation of (auth-  
 orities) is no more than a bluff."

Perhaps the fact of the witness having graduated as recently  
 as 1912 may account for some of this—it certainly does not err in  
 over modesty or want of certainty in its conclusions.

Of course we are not bound by either the opinions, literary or  
 historical, of the witness or his conclusions—moreover, we were  
 invited by all parties to make such independent investigations in  
 a literary and historical sense as we thought proper and to make  
 use of personal knowledge in considering the matters at issue.

Leaving aside the ideas underlying the two works which would  
 admittedly necessitate great similarity in treatment and often in  
 terminology, the evidence of plagiarism may fairly be said to consist  
 in: (1) similarity of language; (2) common inclusions; (3) com-  
 mon omissions; (4) common mistakes; (5) physical impossibility  
 of the "Outline" being written independently of the "Web" in the  
 time.

About the most striking illustrations of (1) (2) and (4) is what is said of Aspasia—and I shall take that as an example of this expert's reasoning.

In speaking of Pericles, what is said in the two books is as follows:

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(2) Pericles, although an Athenian born aristocrat—separated from his citizen wife at her own request—a custom which seems to have been common at the time and was considered quite right—and he married one of those free women, Aspasia, who was a native of Miletus. Aspasia's eloquence and knowledge of politics were remarkable and her influence upon her husband was singularly great. (3) Aspasia made her home a resort not only for the brilliant women associated with her but for all the learned and distinguished men of Athens. Anaxagoras, Sophocles, Euripides, Socrates and Phidias rejoiced to be in her society and to learn of her—Pericles espoused the democratic cause and he acquired a great influence . . . (5) The Democratic party of Athens which was now headed by Pericles, who

“Outline.”

(345) For a time they (the people of Athens) were capable of following a generous leader—and Fate gave them a generous leader. In *Pericles* there was mingled in the strangest fashion political ability with a real living passion for deep and high and beautiful things . . .

He was sustained by what was probably a very great and noble friendship. There was a woman of unusual education, Aspasia from Miletus, whom he could not marry because of the law that restricted the citizenship of Athens to the home-born, but who was in effect his wife. She played a large part in gathering about him men of unusual gifts. All the great writers of the time knew her and several have praised her wisdom.

VII (10) . . . men required sons who were citizens, i.e., whose both parents were citizen-born and therefore . . .

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Here is what the expert who gives evidence as to this passage says—I copy it *in extenso*, as a fair sample of this expert's views:

“There is a remarkable idea occurring in this section in both works. It will serve to open the discussion.

“‘Outline’ on page 345 says of Aspasia’s relations with Pericles that for legal reasons he could not marry her, but she was ‘in effect his wife’—a most astonishing phrase. The temper of to-day does not hesitate to use a more unpleasant word. Why did not Mr. Wells say frankly that she was his mistress? Why did he not call her a ‘courtesan?’ Both epithets are applied in Encyclopædia Britannica articles, and Mr. Wells, by his evidence, leaned heavily on the Encyclopædia. That he should have refrained through delicacy or modesty is ludicrous. Julius Cæsar’s relations with Cleopatra were much the same, and Wells has stigmatised them as ‘amorous pleasantries’—page 510. Plutarch, too, to whom Wells refers, makes it clear that Aspasia’s character for even that age of easy morals was not above reproach, and that she drifted about readily from one man to another. Then why was she ‘in effect’ Pericles’ wife? The qualifying phrase ‘in effect’ reveals that Wells felt there was something wrong. He knew the nature of her position, yet he persists in calling her a wife. Why so? He did not need to bring in the idea of marriage here at all—he did not for Cæsar. Weighing all the possibilities, it seems most probable that the astonishing rendering is due to the influence of a source which Wells is following. And it is remarkable that this odd idea appears in ‘Web’ also, save that there it is presented without apology. We are told that Pericles ‘married’ Aspasia.

“Now it is notable in itself that both these works should mention Aspasia at all. She was quite unimportant. She is completely ignored in such survey histories as Breasted, Browning—Wells’ sources—and Goodspeed.

“How much more remarkable that both should have this odd idea of marriage to Pericles. But further, the entire accounts of her run closely parallel. Thus:

“Again I think I can save time, since I have it down here, by not reading it out?

“His Lordship: Yes.”

*Analysis.*

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Knowledge of politics  
 Influence upon her husband  
 Made her house a resort for  
 learned and distinguished  
 men  
 Anaxagoras . . . etc., re-  
 joiced to be in her society  
 and to learn from her

Her wisdom  
 Accused of instigating a war.  
 Gathering about him men of  
 unusual gifts.  
 All the great men knew her  
 and several have praised  
 her."

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 Riddell, J.A.

The witness finds plagiarism (1) in the two works mentioning Aspasia, at all, whereas it is probable there never was anything like a sketch of Pericles' career and influence without Aspasia being brought in; and it would be more natural to expect a sketch of Lord Nelson without mention of Lady Hamilton than one of Pericles with Aspasia left out. The influence of Aspasia upon Pericles is believed to have been immense, so much so that she was charged with bringing on the Samian and Peloponesian Wars, while his impassioned defence of her is a commonplace of literature. Then the witness asks (2) why she was not called a "courtesan," his "mistress?"—because that "he should have refrained through delicacy or modesty is ludicrous;" and argues that there must be some plagiarism because the "Web" called her his "wife." Can absurdity further go? Had Wells called Aspasia the "wife" of Pericles, making the same mistake as the plaintiff, there might be some foundation for the suggestion of plagiarism. It is wholly wrong to say, as this witness does, that Wells "persists in calling her a wife;" what she is called is "in effect, his wife," and any one with a reasonable knowledge of the English language knows that that phrase connotes that she was not his wife, but was to him as a wife in every way but the legal relation; and that she admittedly was. And utterly unfounded is the imputation that "both should have this odd idea of marriage to Pericles"—the "Web" had it, the "Outline" had not—it specifically says "he could not marry her because of the law."

As to not characterising Aspasia as a "courtesan," most of those who know anything of the position, social and legal, of the *hetairai* in ancient Athens—certainly all of those of my day and College who read the Memorabilia of Xenophon, lib. III, cap. 10, and learned how the wisest man of Athens treated Theodota, one

App. Div. of that class, and discussed, as an equal, matters of high moment  
 1931. with her—will know that “courtesan” and “hetaira” have not the  
 DEEKS same connotation—and many would prefer not to call the woman  
 v. a “mistress” who was to a son of George III. “in effect his wife,”  
 WELLS. but “whom he could not marry because of the law.” To suggest  
 Riddell, J.A. that Wells omitted to call her “courtesan” or “mistress” because  
 Miss Deeks called her a “wife” is nothing short of grotesque. That  
 the witness described it ludicrous to ascribe to delicacy or modesty  
 the omission to call her these names need give us no concern—  
 that is his misfortune.

Then (3) the mention by Wells of her wisdom is considered  
 a plagiary of the “Web’s” mention of her “knowledge of politics,”  
 why, I cannot imagine; (4) her influence over Pericles, as has  
 been said, is a commonplace of history; and (5) every account of  
 her speaks of the gathering of influential men at her home. I  
 have no hesitation in agreeing with the learned trial Judge in the  
 utter worthlessness of this kind of evidence—it is almost an insult  
 to common sense.

In this connection we may consider what was pressed in argu-  
 ment as a flagrant instance of (1) similarity of language and (4)  
 common error.

The occurrence of mistakes in the same sense made by both  
 authors is rightly regarded as indicating that one has copied from  
 the other; and the plaintiff was well within her rights in pointing  
 out what she considered common errors.

We are given these extracts:

*“Web.”*

(96) Columbus was quite  
 unconscious of the fact that  
 he had discovered a great new  
 world, and believing that he  
 had touched the shores of  
 India he called the islands the  
 West Indies. . . .

(97) The return journey  
 was tempestuous . . . In  
 Spain Columbus received his  
 reward. . . . The six In-  
 dians with all their savage

*“Outline.”*

Early in 1493 Columbus  
 returned to Europe. He  
 brought gold, cotton, strange  
 beasts and birds and two wild-  
 eyed painted Indians. . . .

He had not found Japan, it  
 was thought, but India. The  
 islands he had found were  
 therefore called the West  
 Indies. . . .

We cannot tell of his ex-  
 periences as governor of this

## "Web."

paint led the procession. Then came the trophies. . . .

(98) There was no blot on Columbus' dealings with the Indians; but a false report (to that effect) led to his being brought back to Spain in chains. . . .

## "Outline."

Spanish colony nor how he was superseded and put in chains. . . . But Columbus died ignorant of the fact that he had discovered a new continent. . . .

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At the hearing it was argued that the second and the last sentence quoted from the "Outline" was a plagiary of the first from "Web," and when it was pointed out that the language of the latest work on the Discovery of America differed but little from that of either the "Web" or the "Outline," it was argued from the evidence at the trial that there was an error common to both in asserting the ignorance of Columbus—the following was said in the plaintiff's cross-examination (p. 82):—

"His Lordship: He (i.e., Wells) says, 'Columbus died ignorant of the fact that he had discovered a new continent'—A. Both are incorrect. Columbus knew that he had discovered a new continent later.

"His Lordship: I thought he did? A. He did know it.

"Mr. Elliott: Q. How do you know? A. According to the best authorities."

This somewhat startling statement was in direct contradiction with the authority just mentioned, and, if true, the error is shared by every authority I am acquainted with, and is not confined to the two books.

On the whole passage, it will be sufficient to quote from The Cyclopædia of Names, published in 1894.

Under the heading "Columbus," after speaking of his discovery of the Bahamas, Cuba and Haiti, the Article proceeds:—

"All these lands he supposed were outlying parts of Asia . . . he coasted the south side of Cuba (supposed by him to be a peninsula of Asia). . . . He never knew that the regions discovered by him constituted a new continent, always supposing them to be portions of Asia."

Under the heading "West Indies" we read:—

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"Columbus discovered the Bahamas, Cuba and Haiti in 1492, and nearly all the islands were known before the continent of America was discovered. They were supposed to be outlying islands of India or Asia, and, as they had been found by sailing westward, they were called the West Indies. . . ."

Another much pressed common error is to the Cyrus of the Anabasis.

*"Web."*

"It was with 13,000 Greek mercenaries that Cyrus, King of Persia made his way as far as Babylon where he died and the famous retreat of the 10,000 Greeks followed."

*"Outline."*

"An Artaxerxes, a second Xerxes, a second Darius pass across the stage . . . a second Artaxerxes and a second Cyrus his brother fight for the throne . . . this second Cyrus collected an army of Greek mercenaries and marched into Babylonia and was there killed at the moment of victory over Artaxerxes II."

That "Web" was wrong in calling Cyrus the Younger, King of Persia is admitted—just as it would be wrong to call either "Pretender," King of Great Britain; and, if the common error were alleged to be a march by him into "Babylonia" we could understand it; but the expert says:—

"Now what are we to deduce from this as to the status of Cyrus? Was he recognised as king of Persia? He is certainly included among the kings and is called 'Second Cyrus' in direct parallel with 'Second Darius,' etc.: he apparently also is on an equality with Artaxerxes; they 'fight for the throne.' The situation is tantalizingly ambiguous, yet logical probability inclines towards Wells' meaning that Cyrus the younger was Cyrus II. king of Persia. Now this conclusion so hard-won from 'Outline' is granted free in 'Web.' It was with thirteen thousand Greek mercenaries that Cyrus king of Persia made his way as far as Babylon where he died and the famous retreat of the 10,000 Greeks followed . . ."

"But Cyrus never was king: We are driven to conclude that here again the two works agree in defiance of history."

Anything more perverse it is hard to imagine, and it is equally hard to imagine how any one, party or witness, could imagine that any Court could accept or be influenced by it. The "Outline" speaks of two brothers fighting for the throne, one being a second Artaxerxes, the other a second Cyrus—the former was Artaxerxes II., plainly a King, and the other leads an army against him. How any one could be driven to conclude that this invader was a King too passes my comprehension.

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A common error upon which much stress is laid is the spelling of the name of an ancient lady whom "Web" characterizes as "Regent," "Outline" properly as "Queen"—the name "Hatasu." Of this, the witness says:—

"It appears in none of Wells' authorities, nor in any other authority of recent times. Only by special investigation did I discover it, and that in old histories of 1890 and earlier. Since that time the accepted form of the name has been Hatshepaut."

I must confess that as a "general reader" with only "general knowledge" I was startled at the expert's statement. A reference to The Cyclopædia of Proper Names cited *supra* gives us the following: "Hatasu or Hatepsau, a famous Egyptian Queen, daughter of Thothmes I. of the 18th Dynasty and sister of Thothmes II. . . ." It is rather astonishing that such a close student had never heard of the spelling "Hatasu." I am reasonably confident that few Egyptologists and few general readers share in this ignorance.

I have gone over the alleged common errors and can find none peculiar to these two books. Most of them are called errors because contrary to "accepted authorities." Who should be accepted as an authority must be a matter of opinion, and the authority of today may be rejected tomorrow. Practically all the alleged errors mentioned at the hearing were found shared in by one or all of us, some by a Cyclopædia cited—and, in my opinion, it would be an absurdity to find proof of use of the plaintiff's MS. or a breach of her copyright in any or all of them—not even in what the expert thinks "no more than a garbled inaccurate afterthought." So, too, without elaborating, it seems to me that there is nothing in any way conclusive as proof in any or all of the alleged common inclusions, common omissions, common errors, etc.

Before leaving this branch of the inquiry, it may be well to mention a curious fallacy which ran through much of the plain-

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tiff's argument and of which there is an occasional glimpse in the evidence—it is made a matter of suspicion that Wells does not follow the terminology of the authorities he says he consulted. One would have thought it most natural for a literary man, writing a book for popular perusal, to clothe in his own language the historical facts taught him by his authorities rather than to use the terminology of the expert original. Where we have a subject like law—in which a statement is to be accepted because of the position of the person who makes it, his precise words may be and in many cases are of importance and should be given *verbatim*, but this is not the case where the statement is one of a fact.

As to the physical impossibility of the Outline being written, as Wells says, without stealing from the "Web," it is pointed out that he wrote it himself in longhand and it is said that to "do that in a bare nine or ten months is a task that might well stagger one." True "he made his task one of urgency, snatching hastily at facts and views drawn from where he might, padded it out with old hobbies and half-baked opinions of his own, and feverishly kept his penhand busy;" "it may," indeed, "be that it is his habit to work in this hasty fashion;" and the first expert says: "What adequate time was in days and hours I do not know . . . that must be judged by so many considerations that you cannot be tied down to days and hours." But the plaintiff argues: "The bare fact is that Mr. Wells produced a work of some 300,000 words in about six months. Making allowance for necessary rewriting, it works out that he maintained through that period an average production of about 60,000 or 70,000 words a month. This is amazing. But for full effect it must be understood that, according to his emphatic testimony, he did not dictate this, he wrote it all himself in longhand . . . Moreover, he was equally emphatic that he employed no hack writers . . . no one gathered the material for him: he did all this himself . . . his assistants acted merely as critics of the work when produced. It is a stupendous achievement, still further enhanced by the evidence of his correspondence that during these months he was also busy writing his 'Undying Fire.'"

And the evidence is quoted of Sir Harry Johnston devoting three years to a "Compilation," a republication of his "Pioneers of the British Empire," while a Canadian author, Mr. Burpee, says:—

"In 1908 I published 'The Search for the Western Sea,' something under 200,000 words. I had been studying the period with which it attempted to deal for some years and I spent about eighteen months in the actual writing of the book. Now, my field was only a very small corner of the domain of history. While Mr. Wells' field was the whole story of mankind from prehistoric time to the present day . . ."

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Another author of note, Prof. Brett, says:—

"I think I could rank as a fast writer. Under the circumstances under which I had to write the articles in the Encyclopædia Britannica, I wrote 27,000 words in a little over a month. I was really making an epitome of my own work and was my own authority. That is, of course, working under the most favourable conditions that a man could work under. It is entirely incredible to me that a man, single-handed, could prepare a work of this kind in a period of say ten or twelve months."

From which the plaintiff argues that Wells must have had a "collaborator through an unwilling one," namely herself.

Balzac and some other writers of the past could not be called, but instances of distinctly greater speed without collaboration are literary commonplaces. To my mind it is illogical to argue that the investigation and narration of a comparatively obscure and seldom treated search for the Western Seas should take a shorter time than the "whole story of mankind" on which the authorities are abundant if conflicting. I would undertake to write a popular account of the History of the English Law in half the time I should require to write the History of Judicial Combat in Plantagenet Times—any historian of Medicine would write the History of Medicine in Mediæval Times in much less time than he would write of the Revolution in Medical Theory due to Paracelsus—and The Life of Lord Durham properly written would take more time to write than a popular History of Canada.

So, too, it is idle to speculate as to the speed of one writer by observing the speed of another or even as to speed of the same writer at one time by observing his speed at another—Sir Walter Scott is a classical example.

And assuming the estimate of 60,000 or 70,000 words a month to be fair—this means not more than 3,000 or 3,500 words a day, leaving about one-third of the time for collation, etc., of authorities—30 to 35 folios, 10 to 12 foolscap pages, of MS. I am wholly

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 1931. not frequently reach and surpass that amount—and this with a  
 DEEKS careful examination of fact often very puzzling, and of authorities  
 v. often very conflicting.  
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Riddell, J.A. I think that the expert was wise when he swore that he did not know what adequate time was in days and hours.

I cannot find that these and all other considerations advance anything like proof that an experienced writer like Wells, who had thought over the matter for months and who had the assistance and written authorities he speaks of, could not write the book he did without the assistance of the plaintiff's work.

I would dismiss the appeal with costs.

In nothing I have written, is there any intention to belittle the merits of the "Web," which is clearly a labour of love, performed with much care and skill—nor, while I am unable to agree in the conclusions of the experts, do I in the least question their ability, experience and honesty: *quot homines, tot sententiae*, and "Doctors differ."

LATCHFORD, C.J.:—It is greatly to the credit of Miss Deeks that her presentation in person of this appeal has been as full and effective as in the circumstances it could possibly have been argued by the most able counsel. Nothing helpful to her cause has been left unsaid. Yet, after careful consideration of the evidence and of the arguments so ably advanced, I am of opinion that her appeal must fail. To hold the contrary is to accept as true her contention that the MacMillan Company of Canada parted at some time with the possession of the manuscript copy of "The Web," which she had placed in its custody here, or communicated its purport to some one who in turn enabled Mr. Wells so to copy or adapt it as to deprive her of proprietary rights and infringe in Canada the interim copyright she registered.

The evidence is convincing that the Canadian MacMillan Company did not at any time part with Miss Deeks' manuscript, but that it remained in the company's vault until demanded, when it was promptly returned to the author. The period was so long that the manuscript might have been sent to England, but the evidence is that it was not and that its contents were never divulged. Mr. Wells is positive that he never saw "The Web" or ever heard of its author.

Much might be said of the comparisons made by learned professors between Mr. Wells' work and Miss Deeks'. As both deal with what may be called universal history, necessarily both refer to the same persons and events—and of equal necessity must employ terms to a large extent similar. With view-points that have much in common, the same concepts are accepted as true regarding the origin of the universe and of man, but no one has today any proprietary interest in any of these. What is called "New Thought" is very old—a fact familiar to every student of the history of philosophy. Parallels of mention or omission must occur in many general histories, recourse having been had to sources open to every writer. The books placed before Mr. Wells by Mr. J. F. Cox of the London Library would, I am sure, enable that versatile author to write his "Outline" without any aid from the unknown "Web."

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The appeal must be dismissed with costs.

MASTEN, J.A., agreed with LATCHFORD, C.J.

ORDE, J.A.:—I agree that this appeal must be dismissed.

The plaintiff sets up two distinct causes of action, one an infringement of her copyright, the other, breach of trust.

As to the first, the simplest test to apply is that suggested by myself during the argument. If the plaintiff's work "The Web" had already been published and distributed throughout the world as widely, say, as "The Encyclopædia Britannica," could an action for an infringement of the plaintiff's copyright by reason of anything appearing in "The Outline of History" have possibly succeeded, even if it were proved that the defendant Wells had made use of a published copy of "The Web" in writing his book? There can be no copyright in the facts of history or in their chronological sequence. Had "The Web" been published, the defendant Wells was as free to consult and use it in the preparation of his work as the plaintiff was to consult and use "The Encyclopædia Britannica" or any other publication as a source of information. Infringement of copyright in such cases must, as a general rule, consist of the copying of the words of another in the order in which he has used them. The use of the same historical facts or of the same ideas is not enough.

As to the second, the plaintiff failed to prove by any direct evidence that the defendant Wells had ever seen or made use of

App. Div. her manuscript either directly or indirectly. She was forced to  
1931. try to establish her case by the internal evidence afforded by a  
DEEKS comparison of the manuscript of the defendant Wells with her  
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Orde, J.A. Now it is conceivable that her case might have been established in this way. If it were found that certain passages in the two works were couched in the same language, or that there were unexplained errors in both, these facts, coupled with the coincidences in time and other circumstances as to the possession of the plaintiff's manuscript by one of the defendant companies, might have constituted evidence so convincing as to justify a finding that the defendant Wells had used the plaintiff's work, notwithstanding his own denial. It was upon evidence of this sort that the plaintiff relied, but when the comparisons which she made in the course of her able and forcible argument are examined, they fall far short of what is necessary, in my judgment, to constitute evidence sufficiently overwhelming and convincing to offset the positive denials of the defendants' witnesses. The plaintiff fails on this ground also, and her appeal should be dismissed.

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